Applicant Details

First Name	**Evan**
Middle Initial	**M**
Last Name	**Meisler**
Citizenship Status	**U. S. Citizen**
Email Address	**evan.m.meisler@gmail.com**
Address	**Address** **Street** **30 w 63rd st., Apt 19A** **City** **New York** **State/Territory** **New York** **Zip** **10023** **Country** **United States**
Contact Phone Number	**2162154979**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2015**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 22, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**New York University Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Orison S. Marden Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Holmes, Stephen
stephen.holmes@nyu.edu
212-998-6357

Rascoff, Samuel
samuel.rascoff@nyu.edu
(212) 992-8907

Murphy, Liam
liam.murphy@nyu.edu
212-998-6160

References

1. Judge Lewis J. Liman, LimanNYSDChambers@nysd.uscourts.gov, (212) 805-0226.

2. Professor Samuel Issacharoff, samuel.issacharoff@nyu.edu, (212) 998-6580.

3. Diana Zhang, former CEO of NeighborShare, Diana@nbshare.org, (603) 560-1983.

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Evan M. Meisler
30 W 63rd St., Apt #19A
New York, NY 10023
(216) 215-4979
Evan.Meisler@law.nyu.edu

June 12, 2023

The Honorable Timothy J. Kelly
United States District Court for the District of Columbia
E. Barrett Prettyman United States Courthouse
333 Constitution Ave. NW
Washington, D.C. 20001

Dear Judge Kelly:

I am a rising third-year student at New York University School of Law, and I am writing to apply for a clerkship in your chambers for the 2025–2026 term. I am particularly eager to clerk for you because of your extensive prosecution and national security experience before joining the bench. I also plan to work in D.C. long-term and would be thrilled to immerse myself in the D.C. legal world as a clerk in your chambers.

I wish to clerk for two primary reasons. First, I am committed to public service, as illustrated by my non-profit volunteer experience and upcoming State Department internship. Clerking would be both an excellent chance to serve the public and an ideal next step toward a career in government practice. Second, I genuinely enjoy learning, researching, and writing about diverse areas of the law, which led me to serve as an Articles Editor for the *New York University Law Review*, compete in the Marden Moot Court Competition, and pursue teaching and research assistantships. Clerking for you would be an unparalleled opportunity to gain exposure to a wide breadth of legal doctrine.

Last autumn, I was an intern for the Honorable Lewis J. Liman of the United States District Court for the Southern District of New York. I believe that this role, combined with my six years of professional experience before law school, has prepared me to succeed as a clerk in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing samples. Also enclosed are letters of recommendation from Professors Liam Murphy, Samuel Rascoff, and Stephen Holmes. Judge Liman and Professor Samuel Issacharoff have also offered to serve as references. They may be reached at (212) 805-0226 and (212) 998-6580, respectively.

If there is any additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Evan Meisler

Evan M. Meisler

EVAN M. MEISLER
30 W 63rd St., Apt #19A, New York, NY 10023 | (216) 215-4979 | Evan.Meisler@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024
Unofficial GPA: 3.79
Honors: Florence Allen Scholar (top 10% of class based on GPA after first four semesters)
NYU Center for Cybersecurity Cyber Scholar
White & Case / Orison Marden International Public Interest Fellow
Activities: New York University Law Review, Articles Editor & Quantitative Editor
Teaching Assistant to Professors Liam Murphy (Contracts) & Samuel Rascoff (Intelligence Law)
Research Assistant to Professors Samuel Rascoff & Stephen Holmes
Marden Moot Court Competition, Semi-Finalist
Leadership: National Security Law Society, Co-President
International Arbitration Association, Co-President & Treasurer
International Law Society, Board Member

DARTMOUTH COLLEGE, Hanover, NH
Bachelor of Arts in Government, June 2015
Honors: Citation of Meritorious Academic Performance for Research on Private Military Contractors
Activities: Rowing, Three-Time Varsity Letterman, Intercollegiate Rowing Association All-Academic Award

EXPERIENCE

STATE DEPARTMENT OFFICE OF THE LEGAL ADVISER, Washington, D.C.
Incoming Summer Legal Intern, July 2023-August 2023

COVINGTON & BURLING, Washington, D.C.
Summer Associate, May 2023-July 2023
Participate in litigation and regulatory matters. Draft memos for appellate, consumer protection, and antitrust practices.

CHAMBERS OF JUDGE LEWIS J. LIMAN, New York, NY
Judicial Intern, U.S. District Court for the Southern District of New York, August 2022-December 2022
Conducted research and drafted opinions for Title VII, FOIA, false advertising, and cross-border contract disputes.

INTERNATIONAL LAW COMMISSION, Geneva, Switzerland
International Law & Human Rights Fellow, May 2022-August 2022
Performed academic research and prepared remarks for Commissioner Hassouna on emergent topics in international law. Authored paper on international climate law shared at the 2022 UN Climate Change Conference.

EVERQUOTE, Cambridge, MA
Director of Strategy & Business Development, July 2018-September 2021
Managed client relationships generating over $30 million in annual revenue. Conducted rigorous qualitative and quantitative analysis to evaluate strategic business opportunities. Managed two direct reports. As co-chair of community service committee, initiated sponsorship of homeless shelter for people suffering from opioid addiction.

INVESTOR GROUP SERVICES, Boston, MA
Private Equity Consultant, August 2015-June 2018
Delivered 40+ due diligence and portfolio strategy studies for private equity clients. Led case teams consisting of 10+ researchers and associate consultants. Produced timely, high-quality deliverables and built strong client relationships.

VOLUNTEER EXPERIENCE

NEIGHBORSHARE, Cambridge, MA; Head of Donor Growth & Engagement; June 2020-September 2021
Led business development, partnerships, and user research operations for peer-to-peer-giving non-profit startup.

BRIGHAM AND WOMEN'S HOSPITAL, Boston, MA; Volunteer Musician; November 2020-September 2021
Performed music over Zoom for patients in Boston-area hospitals during COVID-19 pandemic to boost morale.

ADDITIONAL INFORMATION

Secret-level security clearance. Proficient in French. President of acapella group Substantial Performance and guitarist. Rowed competitively in Henley Royal Regatta, Heineken Roeivierkamp, and won gold medal at Head of the Charles.

Name: **Evan M Meisler**
Print Date: **06/07/2023**
Student ID: **N11232337**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
Torts	LAW-LW 11275	4.0	B+
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	B+
Instructor: Samuel Issacharoff			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Benedict W Kingsbury			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Elizabeth J Chen			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Emma M Kaufman			
International Law	LAW-LW 11577	4.0	A-
Instructor: Jose E Alvarez			
Contracts	LAW-LW 11672	4.0	A
Instructor: Liam B Murphy			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Law and Society in China Seminar	LAW-LW 10871	2.0	A
Instructor: Ira Belkin			
Katherine A Wilhelm			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Liam B Murphy			
Constitutional Law	LAW-LW 11702	4.0	A
Instructor: Kenji Yoshino			
Federal Judicial Practice Externship	LAW-LW 12448	3.0	CR
Instructor: Michelle Beth Cherande			
Alison J Nathan			
Federal Judicial Practice Externship Seminar	LAW-LW 12450	2.0	CR
Instructor: Michelle Beth Cherande			
Alison J Nathan			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A+
Instructor: Samuel Issacharoff			
Arthur R Miller			
Orison S. Marden Moot Court Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A+
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Samuel J Rascoff			
Colloquium on Law and Security	LAW-LW 11698	2.0	A
Instructor: Stephen Holmes			
David M Golove			
Rachel Anne Goldbrenner			
Research Assistant	LAW-LW 12589	2.0	CR
Instructor: Stephen Holmes			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

Allen Scholar-top 10% of students in the class after four semesters
Staff Editor - Law Review 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

School of Law

40 Washington Square South, Room 506
New York, New York 10012-1099
Telephone: (212) 998-6357
E-mail: stephen.holmes@nyu.edu

Stephen Holmes
Walter E. Meyer Professor of Law

June 5, 2023

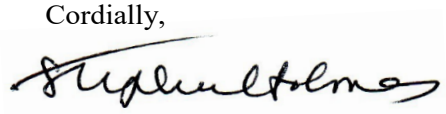
Dear Judge:

I am extremely pleased to endorse Evan Meisler's candidacy for a clerkship. I have no hesitation in saying that Meisler is one of the most gifted students I have had the pleasure of knowing in more than forty years of teaching. He is a truly exceptional young legal scholar and would without any doubt be a superb clerk at your court. His final paper in my Colloquium on Law and National Security, a brilliant exposition of Turkiye Halk Bankasi A.S. v. United States, was by far the most penetrating and original paper of the semester.

He also worked for me this spring as a research assistant on the consequences for international law and politics of the Russian invasion of Ukraine. In this capacity he wrote an outstanding series of papers on the reactions to the war in India, Brazil and Turkey. I am not uninformed about these topics but I have to admit that I learned an immense amount from these marvelously written and tightly argued papers. Having benefited from his appetite for hard-work, his curiosity and his ability to summarize crisply difficult material, I cannot speak too highly of his talents for research and writing.

I have no doubt that he would be an extraordinary clerk. I recommend him to you with unreserved enthusiasm.

Cordially,



Stephen Holmes
Walter E. Meyer Professor of Law

New York University
A private university in the public service

School of Law

40 Washington Square South, 411K
New York, NY 10012-1099
Telephone: (212) 992-8907
Facsimile: (212) 995-4590
E-mail: samuel.rascoff@nyu.edu

Samuel J. Rascoff
Professor of Law

June 8, 2023

Dear Judge:

I am delighted to recommend Evan Meisler to you for the position of law clerk. Although Evan has never been my student, I got to know him well as my research assistant this past summer and again as my teaching assistant this past semester. Based on our many hours of interaction I can safely say that Evan would make a wonderful clerk. He is extremely smart, highly professional, nimble with technology, and fun to be around.

Last summer I reached out to Evan (on the strength of a glowing recommendation from a colleague) for help in planning a seminar in the legal architecture of espionage and all matters intelligence. He proved very effective at researching the state of the art in the field and collaborated with me over months in generating a compelling syllabus. On the strength of his work as an RA I asked Evan to serve as a TA for the seminar. He excelled at that, too. Whether it was making a last-minute tweak to the syllabus or facilitating clear communication with the seminar members or weighing in thoughtfully about the policy issues in play, Evan proved to be an invaluable TA.

Evan's transcript attests to the fact that his success as an RA and TA was hardly a fluke. He has, of late, developed the habit of earning A+s in very difficult doctrinal classes. On top of that he serves on Law Review and is involved in other worthy extracurricular pursuits.

Thinking back on my own clerkship experiences, Evan is precisely the sort of clerk who will wear well in chambers. He will do excellent work, do it on time, and make it all happen with a sense of joyous dedication.

In short, I say without hesitation: Hire Evan!

Sincerely,

Samuel J, Rascoff

New York University
A private university in the public service

School of Law

40 Washington Square South
New York, New York 10012-1099
Telephone: (212) 998-6160
Facsimile: (212) 995-4894
Email: liam.murphy@nyu.edu

Liam Murphy
Herbert Peterfreund Professor of Law
& Professor of Philosophy

June 5, 2023

Dear Judge

I write to recommend EVAN MEISLER to you for a clerkship in your chambers. It is a special pleasure to do so. Evan was in my contracts class in the spring of 2022 and served as my TA for contracts last fall. I know him well.

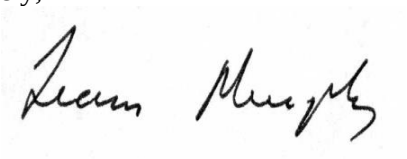
I have rarely been in a position to write for someone who is so clearly already fully prepared for a successful legal career. He is exceptionally mature for a second-year law student. No doubt this is in part because of his six years in the private sector between college and law school. But he nonetheless came to law school as an eager student, and since his second semester has been performing at the very top of the class. His exam for me was excellent, and he was always thoughtful and constructive in class discussion. He was one of my very first choices for a TA. Since then, Evan has gone from strength to strength. He must be especially proud, and rightly so, of the A+ he was just awarded in Professors Samuel Issacharoff and Arthur Miller's complex litigation class, one of the most demanding and competitive classes we offer.

Evan was an excellent teaching assistant. What I have my TAs do is prepare sample problems for discussion with a section of the class. We discuss the problems as a group before the TAs meet with the students. The problems Evan drafted showed creativity and a grasp of contract doctrine as strong as I have seen in any student. But even more important, perhaps, is that he was extremely constructive in helping the other TAs work out kinks in problems they had drafted. He has an unprepossessing, calm manner that allows him to stop colleagues going astray without them feeling at all criticized. Evan is also, as his writing sample shows, an excellent writer. In all, his intelligence, legal acumen, writing skills, and excellent collaborate ability, make him extremely well qualified for a clerkship.

But with Evan there is more. He spent six years in the financial sector. He is now considering a mix of private practice and government service in the defense/intelligence sector. He would also like to teach at some point, perhaps as an adjunct. What I see is a person who knows very well the kind of work he wants to do, even if the exact mix remains to be worked out (and will no doubt turn in part on the opportunities that come his way). That, and a person who is one hundred percent prepared to excel on his chosen path. Evan is not, in other words, merely another very bright young law student with lots of promise. He is already operating with a level of seriousness of purpose and maturity that one would normally expect of an attorney several years on from their clerkships. I believe that Evan will be an unusually valuable clerk.

Let me end by saying that with all his achievements, Evan somehow manages to live a full life, one that includes sports and music, and helping others. He is also charming and easy-going, fully comfortable in his skin. I recommend him very highly and without reservation. Please let me know if I can be of any further assistance.

Sincerely,



The following writing sample is my brief for the semi-final round of NYU's Marden Moot Court Competition. This brief is entirely my own work and has not been edited by anybody else. Please note that the competition organizers provided no citation for the imaginary district and circuit court cases that formed the record for this competition. Therefore, all citations to those imaginary cases appear as citations to the record. In actual practice, I would conform to Bluebook convention by citing to all cases by name, identifying the reporter, and providing pinpoint citations as appropriate.

No. 24-3690

IN THE
Supreme Court of the
United States

———————

UNITED STATES OF AMERICA
Petitioner,

v.

PAUL YOUNG,
Respondent.

———————

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

———————

BRIEF FOR THE UNITED STATES

———————

EVAN M. MEISLER
Solicitor General

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether it was error for the Fourteenth Circuit to override the express terms of the Federal Tort Claims Act by applying the "prison mailbox rule," a legal fiction which deems certain notices "filed" when they are handed to a prison official, to an untimely administrative claim.

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STATUTES

REGULATIONS

FEDERAL RULES

MISCELLANEOUS

STATEMENT OF FACTS

Paul Young ("Young" or "Respondent") is an inmate at Fairview Correctional Facility, a federal penitentiary in the District of Eagle State. R. at 3. Young alleges that on February 14, 2017, a group of prison guards and fellow inmates entered his cell and physically abused him. R. at 3, 13. He further alleges that he was denied adequate medical care by the prison's medical ward personnel. R. at 4, 13. Young did not pursue legal redress immediately. R. at 4.

Young eventually decided to file an administrative claim under the Federal Tort Claims Act ("FTCA"). R. at 13. The FTCA imposes a two-year statute of limitations for filing such a claim. 28 U.S.C. § 2401(b). Accordingly, Young was required to present his Form SF-95 administrative notice to the Bureau of Prisons ("BOP") by February 14, 2019. R. at 13.

Approximately one month before the end of the limitations period, Young dismissed his previous attorney and retained new counsel. R. at 4, 13. Young filled out an SF-95, allegedly without the assistance of his new attorney. R. at 4, 13. He claims to have eschewed assistance of counsel because he was anxious about the approaching filing deadline, and feared that it would take too long for his new attorney to become fully acquainted with his case. R. at 13.

In a sworn and signed affidavit, Young claims that on February 8, 2019, he gave his completed SF-95 to a correctional officer charged with sending the form as First-Class Mail via the prison mail system. R. at 4, 13. The Postal Service attempted to deliver the claim to BOP's regional office on February 14, 2019, the last day of the limitations period. R. at 4. This delivery attempt failed because it took place after the close of business hours. R. at 4, 17. The form was delivered and stamped on February 15, 2019, the day after the limitations period lapsed. R. at 4.

After the BOP denied his claim as untimely, Young sued in the District Court for the District of Eagle State. R. at 4. The United States ("Government" or "Petitioner") moved for

summary judgment, arguing that Young's claim was barred by the FTCA's statute of limitations. R. at 3. Young argued that the "prison mailbox rule," according to which some claims by inmates are deemed "filed" when they are given to prison authorities, rendered his complaint timely. R. at 5. The district court granted the Government's motion, holding that the prison mailbox rule does not apply to administrative claims with limitation periods defined by statute or regulation. R. at 3. The Court of Appeals for the Fourteenth Circuit reversed and remanded, holding that the prison mailbox rule extends to administrative claims made under the FTCA. R. at 12, 13. The Government appealed, and the Supreme Court granted certiorari. R. at 19.

SUMMARY OF THE ARGUMENT

Plaintiff's FTCA claim was received by the Bureau of Prisons after the relevant limitations period had run. The "prison mailbox rule" does not apply in the face of an explicit statutory and regulatory mandate such as the FTCA's. Accordingly, Young's claim is not timely filed, and the United States' motion for summary judgment should be granted.

The FTCA is a limited waiver of sovereign immunity. Its statute of limitations, as defined by statute and regulation, is a condition of that waiver. Because sovereign immunity can be waived only explicitly, by consent, and at the absolute discretion of Congress, the FTCA's statute of limitations must be construed narrowly and favorably to the Government.

The FTCA's text, and the regulations implementing it, require a claim to be received by the relevant agency within two years of its accrual. A faithful textual interpretation of "receive" would require that Young's claim be placed physically in the Bureau of Prisons' possession within the limitations period. Merely mailing the claim and/or attempting, but failing, to deliver the claim during this period do not satisfy this requirement. The lack of any textual exception for inmates, despite amendments that single out inmates in other ways, signifies that inmates are not to be

afforded special leniency under the FTCA. Congress's policy considerations undergirding the FTCA's statute of limitations, as well as the rationales for statutes of limitations in general, buttress the conclusion that physical receipt of a claim within the limitations period is required.

Taken together, the two most relevant Supreme Court cases, Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993), stand for the proposition that a statute of limitations' plain text is presumptively controlling, even for inmates such as Young. The court should only entertain policy consideration, which may or may not justify leniency, only in the case of statutory and regulatory silence or ambiguity. Virtually all circuit courts of appeals have adopted this interpretation. The few that have held otherwise rely on flawed readings of Houston and Fex. The Fourteenth Circuit's expansive construal of the "prison mailbox rule" places Houston in irreconcilable and unnecessary tension with Fex, and should therefore be rejected.

ARGUMENT

I. SUMMARY JUDGMENT IS SUBJECT TO *DE NOVO* REVIEW ON APPEAL.

The decision to grant or deny a motion for summary judgment is a question of law, which is reviewed *de novo*. Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review . . . questions of law . . . [are] reviewable *de novo* . . . ."); accord 11 James W. Moore et al., Moore's Federal Practice § 56.131 (3d ed. 2022). A party is entitled to summary judgment if there is "no genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and if after drawing all factual inferences "in the light most favorable to the party opposing the motion," United States v. Diebold, Inc., 369 U.S. 654, 655 (1962), the moving party is entitled to judgment as a matter of law. See also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (stating that summary judgment is appropriate where "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof").

II. AS A WAIVER OF SOVEREIGN IMMUNITY, THE FTCA DEMANDS A NARROW READING FAVORABLE TO THE GOVERNMENT.

The Federal Tort Claims Act is a waiver of sovereign immunity, a principle which forecloses legal action against the federal government for the tortious acts of its employees unless it consents to liability by statute. See Price v. United States, 174 U.S 373, 375–76 (1899) ("It is an axiom of our jurisprudence. The Government is not liable to suit unless it consents thereto, and its liability . . . cannot be extended beyond the plain language of the statute authorizing it."); Jeffrey Axelrad, Federal Tort Claims Act Administrative Claims: Better than Third-Party ADR for Resolving Federal Tort Claims, 52 Admin. L. Rev. 1331, 1332 (2000) ("Until the Federal Tort Claims Act was enacted in 1946, no general remedy existed for torts committed by federal agency employees."). Since waivers of sovereign immunity are acts of legislative grace, the terms and conditions of any such waiver are entirely within Congress's discretion. See Schillinger v. United States, 155 U.S. 163, 166 (1894) (noting that "Congress has an absolute discretion to specify the cases and contingencies" in which the government may be held liable).

The terms of any sovereign immunity waiver must be construed narrowly. See Irwin v. Dep't of Veterans Affs., 498 U.S. 89, 94 (1990) (requiring that "condition[s] to the waiver of sovereign immunity . . . must be strictly construed"); United States v. Mitchell, 445 U.S. 535, 538 (1980) ("A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'") (quoting United States v. King, 395 U.S. 1, 4 (1969)). Absent a clear statutory indication to the contrary, disputes as to sovereign immunity should be resolved in favor of the Government. See Lane v. Pena, 518 U.S. 187, 195 (1996) (noting the Court's "established practice of construing waivers of sovereign immunity narrowly in favor of the sovereign"). The Court has specifically applied this pro-Government "rule of construction," United States v. Nordic Vill. Inc., 503 U.S. 30, 34 (1992), to the FTCA's statute of limitations. See United States v. Kubrick, 444

U.S. 111, 117 (1979) (describing the FTCA's statute of limitations as a "condition of [the] waiver" which the Court should not "extend . . . beyond that which Congress intended").

The foregoing considerations demand that the Court only adopt Respondent's lenient construal of the FTCA and relevant precedent if the statutory text and case law unequivocally compel their preferred reading. The following sections demonstrates that this is not the case.

III. TREATING CLAIMS RECEIVED AFTER EXPIRATION OF THE LIMITATIONS PERIOD AS TIMELY CONTRADICTS THE FTCA'S TEXT AND PURPOSE.

Nobody disputes that Young's claim was not successfully delivered to BOP during the limitations period. R. at 4, 13. This section draws on the FTCA's text and purpose to refute the argument that Young's claim was "received," for limitations purposes, at some earlier juncture, such as when it was given to prison authorities, mailed, or when the failed delivery took place.

A. The FTCA's Plain Text Requires Timely Physical Receipt of Claims by the BOP.

The FTCA requires that an "action shall not be instituted upon a claim against the United States" until the claimant has exhausted his administrative remedies by first "present[ing] the claim to the appropriate Federal agency . . . ." 28 U.S.C. § 2675(a); see McNeil v. United States, 508 U.S. 106, 107 (1993) (stating that the presentment requirement is "unambiguous" from the text of the FTCA). Presentment must take place "within two years after such claim accrues," and a claim is "forever barred" for failure to adhere to this timeline. 28 U.S.C. § 2401(b).

Congress authorized the Attorney General to issue regulations defining the conditions of presentment and the statute of limitations. 28 U.S.C. § 2672. A claim is considered "presented" when "a Federal agency *receives* from a claimant . . . an executed Standard Form 95 or other written notification of an incident . . . ." 28 C.F.R. § 14.2(a) (emphasis added). The relevant agency is the one "whose activities gave rise to the claim," id., in this case the Bureau of Prisons.

Agencies are further enabled to "issue regulations and establish procedures" governing receipt of claims. 28 C.F.R. § 14.11. The Bureau of Prisons requires that claimants "either mail or deliver the claim to the regional office in the region where the claim occurred." 28 C.F.R. § 543.31(c).

A claim is "presented" when it is "received" by the BOP's regional office. 28 C.F.R. § 14.2(a); 28 C.F.R. § 543.31(c). "Receive" means to "come into possession of or get from some outside source." Receive, Black's Law Dictionary (11th ed. 2019); see also Receive, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/receive (last visited Mar. 10, 2023) (defining "receive" as "to come into possession of"). The notion that a claim could be considered "presented" or "received" when handed to a local prison official is incompatible with the FTCA's text, because such a claim clearly has not come into the possession of BOP's regional office. Nor can a claim be considered "received" when it is mailed, because BOP is not in possession of claims still in transit. And even if, counterfactually, "receive" were ambiguous, the Department of Justice's interpretation of DOJ and BOP regulations is, at a minimum, supported by valid reasoning and thus deserving of respect. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

This understanding of the receipt requirement is reinforced by intratextual analysis. Other deadlines in the FTCA refer to the time of "mailing," indicating that if Congress meant for mailing to fulfill the presentment requirement, it would have written the statute to say so. See, e.g., 28 U.S.C. § 2401(b) (requiring tort claims to be initiated within six months after the agency mails notice of final denial of an administrative claim); see also Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002) (noting the "general principle of statutory construction" that when "'Congress includes particular language in one section of a statute but omits it in another section of the same Act,'" it is presumed to be done intentionally) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)); accord. Henry J. Friendly, Benchmarks 224 (Univ. Chi. Press 1967).

The plain text also forecloses the argument that the failed attempt to deliver Young's claim on February 14 constitutes presentment, because this attempt did not transfer possession of his claim to the BOP. Federal courts have held that failed delivery is not presentment. See, e.g., Sacks v. U.S. Dep't of Health & Hum. Servs., No. 16-cv-05505-MEJ, 2017 WL 2472952, at *3 (N.D. Cal. June 8, 2017) (holding that failed delivery of an FTCA claim on a non-business day did not establish presentment). Requiring successful delivery is consistent with the judicial construction of other statutes of limitations as well. See, e.g., In re World Imports, 862 F.3d 338, 241–42 (3d Cir. 2017) (holding that, according to dictionary definitions and UCC interpretation, goods are "received" only when the debtor takes physical possession of them); Group Italglass U.S.A., Inc. v. United States, 839 F. Supp. 868, 870 (Ct. Int'l Trade 1993) (finding a duties protest untimely after plaintiff attempted to deliver it in-person and by fax after business hours on the final day of the limitations period); cf. Turner v. City of Newport, 887 F. Supp. 149, 150 (E.D. Ky. 1995) (accepting an after-hours court filing on the last day of a limitations period because it was deposited on the correct date and the courts are "always open" for filing) (citing Fed. R. Civ. P. 77).

Lastly, the absence of any textual exception for inmate claims speaks for itself. This absence is especially instructive because other FTCA sections were amended with inmate-specific language in 1995, shortly after the Court declined to apply the prison mailbox rule in Fex, 507 U.S. at 52. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 806, 110 Stat. 1231-66, 1321-75 (1996) (amending FTCA to prohibit incarcerated felons from suing the government for mental suffering alone). If Congress meant to overrule Fex by creating a rule of leniency for inmate filings, it would have done so. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 488 (1940) (noting that Congress's decision not to overturn the judicial interpretation of a statute that it has chosen to amend suggests "legislative recognition that the judicial construction is the correct one").

"[F]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Wilson v. Garcia, 471 U.S. 261, 266 (1985) (quoting Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)). In addition to waiving sovereign immunity, the FTCA governs "a vast multitude of claims" which "impose[] some burden on the judicial system" whenever the statutorily mandated procedures are not obeyed. McNeil v. United States, 508 U.S. at 112. "The interest in orderly administration of this body of litigation is best served by adherence to the straightforward statutory command" which, in turn, calls for "the most natural reading of the statute." Id. The waiver of sovereign immunity and the interest in efficient and uniform administration of the law strongly support giving "receive" its ordinary meaning, rather than endorsing Respondent's proposed concept of constructive receipt.

Moreover, applying an expansive definition of "receipt" to the FTCA, wherein Congress and the Executive have promulgated unambiguous language calling for the timely physical receipt of a claim, is tantamount to declaring that the political branches shall not have the last word in crafting statutes of limitations. This message would be inconsistent with the Court's holding that statutes of limitations are "subject to a relatively large degree of legislative control," Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945), especially in the highly discretionary context of a waiver of sovereign immunity. See Schillinger v. United States, 155 U.S. at 166.

B. Requiring Timely Physical Receipt of Claims Furthers the FTCA's Policy Goals.

The FTCA's legislative history and animating policy considerations provide further support for the requirement of actual physical receipt of a claim within two years of its accrual. Congress amended the FTCA in 1966 to include a presentment requirement so that agencies could quickly identify and settle meritorious claims against it, thereby averting pointless lawsuits. See S. Rep. No. 1327, at 4 (1966). The resulting efficiencies would "benefit private litigants, but

would also be beneficial to the courts, the agencies, and the Department of Justice itself." Id. at 2. Congress's explicit concern for these stakeholders mirrors the justifications for statutes of limitations in general: repose, accuracy, and discouraging procrastination. These policy interests are best served by requiring the timely physical, rather than constructive, receipt of claims.

First, statutes of limitations benefit *defendants* by supplying a guarantee of repose. See Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) ("The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind . . . ."); Wilson v. Garcia, 471 U.S. at 271 ("[E]ven wrongdoers are entitled to assume that their sins may be forgotten."). They also protect defendants from the aggravated time, expense, and risk of error associated with defending stale claims "in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." United States v. Kubrick, 444 U.S. at 117. They protect defendants not only from lackadaisical plaintiffs, but also from fraudsters seeking to "assert[] rights after the lapse of time ha[s] destroyed or impaired the evidence which would show that such rights never existed . . . ." Bailey v. Glover, 88 U.S. 342, 349 (1874). An agency cannot and will not begin the important process of preserving relevant evidence, or relinquish its legitimate expectation of repose, unless and until a claim has been physically delivered into its possession.

Second, statutes of limitations serve *the judiciary* by extinguishing claims that would require the onerous investigation of distant historical facts. See, e.g., Resolution Tr. Corp. v. Farmer, 865 F. Supp. 1143, 1152 (E.D. Pa. 1994) (stating that statutes of limitations are justified by considerations of "judicial economy"); Goad v. Celotex Corp., 831 F.2d 508, 511 (4th Cir. 1987) (describing statutes of limitations as "instruments of public policy and of court management"). They also bolster social efficiency by enabling parties to order their affairs

without fear of liability for old transactions reemerging. See Developments in the Law: Statutes of Limitations, 63 Harv. L. Rev. 1177, 1185 (1950) ("[T]he public policy of limitations lies in avoiding the disrupting effect that unsettled claims have on commercial intercourse."). Agencies, courts, and private entities can plan and allocate resources more efficiently knowing that incidents whose statutes of limitations have run will not resurface by surprise due to late-arriving mail.

Finally, statutes of limitations serve *plaintiffs* by encouraging action while their claims are fresh. Crown v. Parker, 462 U.S. 345, 352 (1983) ("Limitations periods are intended . . . to prevent plaintiffs from sleeping on their rights . . . ."). Spurring plaintiffs to act protects them from jurors who may be inclined to penalize perceived procrastinators. See Riddlesbarger v. Hartford, 74 U.S. 386, 390 (1868) (noting that statutes of limitations exist because a valid claim is "not usually allowed to remain neglected," so the passage of time creates "a presumption against its original validity"); Wood v. Carpenter, 101 U.S. 135, 139 (1879) (stating that statutes of limitations are intended to "stimulate to activity and punish negligence"). Leniently applying the FTCA's statute of limitations would thus enable plaintiffs to undermine their own interests by sitting on their hands, thereby permitting evidence to decay and inviting a jury's prejudice.

It would be unavailing for Young to claim that the FTCA's requirements are arbitrary, unfair to inmates, or that his failure to adhere to them is inconsequential and excusable. Statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay." Chase Sec. Corp. v. Donaldson, 325 U.S. at 314 . Statutes of limitations represent a legislative judgment as to when "the need for repose and avoiding stale claims outweighs the interests in enforcing the claim." Katharine F. Nelson, The 1990 Federal "Fallback" Statute of Limitations: Limitations by Default, 72 Neb. L. Rev. 454, 462 (1993). Congress's choice to "cut off rights, justifiable or not . . . must

be strictly adhered to by the judiciary," and any "remedies for resulting inequities are to be provided by Congress, not the courts." Kavanagh v. Noble, 332 U.S. 535, 539 (1947). Applying the prison mailbox rule to the FTCA, where Congress has spoken clearly as to the length and terms of the limitations period, would subvert the legislative intent and thwart the policy considerations animating both the FTCA in particular and statutes of limitations in general.

IV. THE PRISON MAILBOX RULE IS INAPPLICABLE TO YOUNG'S CLAIM BECAUSE THE FTCA'S FILING REQUIREMENTS ARE UNAMBIGUOUS.

A. Fex v. Michigan and Houston v. Lack Require Inmates to Obey Unambiguous Statutory and Regulatory Filing Requirements.

The district court and the Fourteenth Circuit relied principally on Houston v. Lack, 487 U.S. 266 (1988), and Fex v. Michigan, 507 U.S. 43 (1993) to justify their decisions. R. at 5, 14–15. In Houston, the Court adopted the prison mailbox rule for unrepresented inmates' notices of appeal, holding that such a notice is "filed" for purposes of the Federal Rules of Civil Procedure when it is handed to prison authorities for mailing. Houston, 487 U.S. at 270. In Fex, the Court declined to apply the prison mailbox rule to an inmate's request for final disposition of charges pursuant to the Interstate Agreement on Detainers ("IAD"). Fex, 507 U.S. at 52. The Court reasoned that the IAD's statute of limitations, which requires trial within 180 days after the inmate "shall have caused to be delivered" his request, starts to run on the date of actual receipt. Id.

Contrary to the Fourteenth Circuit's interpretation, Houston did not hold that the prison mailbox rule applies to all filings by inmates regardless of the statutory or regulatory scheme. R. at 14. Rather, the Houston Court implicitly accepted that the filing requirements were controlling, but held that the statute and rule furnishing these requirements were ambiguous:

> Respondent stresses that a petition for habeas corpus is . . . subject to the statutory deadline set out in 28 U.S.C. § 2107. But . . . [t]he statute . . . does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed . . . and nothing in the statute suggests that . . . it would be inappropriate to

> conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding . . . .

Houston, 487 U.S. at 272. The Court similarly emphasized the importance of statutory ambiguity in its discussion of the Federal Rules of Appellate Procedure's filing requirements:

> The question is . . . whether the moment of "filing" occurs when the notice is delivered to the prison authorities or at some later juncture in its processing. The Rules are not dispositive on this point, for neither Rule sets forth criteria for determining the moment at which the "filing" has occurred.

Id. at 273. If the Court meant to hold that inmates should categorically be treated leniently with respect to filing deadlines, it would have said so, and need not have engaged in statutory interpretation, which the Fourteenth Circuit declined to do. R. at 15. Properly read, Houston does not cast doubt on the idea that clearly defined statutory and regulatory filing deadlines, such as the FTCA's, are binding on inmates. Only after first exhausting its analysis of the statute and finding it ambiguous did the Court turn to "policy grounds" to justify leniency. Id. at 275.

The Fex Court rejected the prison mailbox rule due partly to "indications in the text," only resorting to policy considerations, as in Houston, because "the text alone [was] indeterminate." Fex, 507 U.S. at 52. Fex thus provides two lessons. First, Houston's prison mailbox rule does not apply automatically to all claims by inmates; if it did, Fex necessarily would have been come out differently. Second, sympathy for incarcerated inmates' special circumstances cannot overcome a textually unambiguous filing requirement prescribed by statute. Fex, 507 U.S. at 52 (declaring that policy arguments about "fairness" are "more appropriately addressed to . . . legislatures," and rejecting readings of the IAD of which the text "is simply not susceptible"). Even the Fex dissent focused on the statutory text, briefly mentioning Houston only to recall its policy considerations. See id. at 58. The dissenters restated Houston's holding narrowly as "a *pro se* prisoner's *notice of appeal* is 'filed' at the moment it is conveyed to prison authorities . . . ." Id. (Blackmun, J.,

dissenting) (emphasis added), which is far narrower than the Fourteenth Circuit's holding. R. at 14. No Justices, either in Houston or Fex, espoused the Fourteenth Circuit's extreme stance.

Unlike the statutes and rules at issue in Houston and Fex, the FTCA's statutory and regulatory scheme is unambiguous. As discussed in Part III.A., the FTCA's plain text requires that the BOP's regional office must physically receive a would-be plaintiff's claim within two years of accrual. Thus, Houston and Fex dictate that the prison mailbox rule does not apply here.

The Fourteenth Circuit found Fex to be inapplicable because its animating policy concern, namely the fear of precluding meritorious prosecutions, Fex, 507 U.S. at 50, is absent in this case. R. at 14. Accordingly, the court held that fairness and the balance of the parties' interests favor an expansive application of the prison mailbox rule. R. at 15. This reasoning is erroneous for three reasons. First, as just discussed, neither Houston nor Fex suggests that policy considerations suffice to override the FTCA's clear statutory text. Second, as discussed in Part III.B. above, every statute of limitations, including the FTCA's, is animated by compelling policy considerations that are best served by strict judicial interpretation. The Fourteenth Circuit does not explain why the considerations favoring leniency outweigh the policy determinations that motivated Congress, the Department of Justice, and the BOP to implement the FTCA's presentment requirement in the first place. Thus, even if policy considerations were dispositive, Respondent has given insufficient reasons to hold that these considerations command leniency. Third, the need for leniency in unusual circumstances is already met by doctrinal exceptions to statutes of limitations. For example, a court may deem a claim timely filed if a plaintiff's mail was unreasonably rejected, or the plaintiff has shown "excusable neglect," or if extenuating circumstances inhibited the plaintiff from accessing the mail, or under the doctrine of equitable tolling. See Huskey v. Fisher, 601 F. Supp. 3d 66, 76–78 (N.D. Miss. 2022) (explaining how these doctrines can be used to render a late

claim timely). But these arguments are conspicuously absent from the record, and the Court should not contort or disregarding its own precedent to make up for plaintiff's failure to plead them.

Lastly, the Fourteenth Circuit's concern about Fex silently overruling Houston is mistaken. R. at 15. The Government's interpretation is that Fex announces a general rule that inmates must obey textually unambiguous statutory filing guidelines; Houston provides an exception if, and only if, the statute is ambiguous and policy reasons clearly favor leniency. Thus, the Government merely suggests that Fex clarifies the outer limits of Houston which, unlike overruling by implication, is a commonplace phenomenon in Supreme Court jurisprudence. See generally Richard M. Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861 (2014). Conversely, by reading Houston more expansively than its language permits, the Fourteenth Circuit's holding places these otherwise consistent cases at loggerheads, raising the very specter of silent overruling which it so strenuously cautions against. The courts of appeals agree that the Government's interpretation leaves these mutually compatible cases intact, as discussed next.

B. Most Courts of Appeals Have Adopted the Government's Interpretation of Fex.

"[V]irtually every circuit to have ruled on the issue has held that the mailbox rule does not apply to [FTCA] claims." Vacek v. U.S. Postal Serv., 447 F.3d 1248, 1252 (9th Cir. 2006); see, e.g., Smith v. Conner, 250 F.3d 277, 278 (5th Cir. 2001) ("Houston interpreted an undefined term in a federal rule of procedure; it did not announce a universal rule for prisoner filings. . . . [W]hen the language of the governing rule clearly defines the requirements for filing, the text of the rule should be enforced as written.") (citing Fex, 507 U.S. at 52); Nigro v. Sullivan, 40 F.3d 990, 995 (9th Cir. 1994) ("Fex instructs that Houston policies cannot override the plain meaning of a procedural rule."); Longenette v. Krusing, 322 F.3d 758, 762–63 (3d Cir. 2003) ("Houston's narrow holding . . . was designed to protect pro se prisoners in the absence of a clear statutory or

regulatory scheme."); Moya v. United States, 53 F.3d 501, 504 (10th Cir. 1994) ("Under the FTCA . . . a request for reconsideration is not presented to an agency until it is received by the agency. Mailing of a request for reconsideration is insufficient to satisfy the presentment requirement."); Garvey v. Vaughn, 993 F.2d 776, 782 n.15 (11th Cir. 1993) ("Houston is restricted to federal *court* filings; a notice of appeal given to prison authorities for delivery to a person or entity other than a federal court is not included in 'Houston's mailbox rule.'"); see also Velez-Diaz v. United States, 507 F.3d 717, 719–20 (1st Cir. 2007) (refusing to apply the mailbox rule to an FTCA claim because the statute's time limit is "a condition of the United States' waiver of sovereign immunity," and thus failure to comply is "a fatal defect."); Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993) (noting that presentment is "construed narrowly" and that an FTCA claimant bears the burden of showing it is met). District courts in circuits that have not yet ruled on this issue have recognized and adopted the majority rule. See, e.g., Boomer v. Deboo, No. 2:11-CV-07, 2012 WL 112328, at *2 (N.D.W. Va. Jan. 12, 2012) (noting that the Fourth Circuit has yet to address this issue, and following "virtually every other circuit" by holding that "the mailbox rule does not apply to [FTCA] claims") (quoting Vacek, 447 F.3d at 1252); Lakin v. U.S. Dep't of Just., 917 F. Supp. 2d 142, 145–46 (D.D.C. 2013) (declining to apply the mailbox rule to a FOIA appeal because the administrative receipt requirement distinguished it from Houston).

Only two Courts of Appeals disagree. The Second Circuit extended Houston to FTCA claims because it felt there was "no difference between the filing of a court action," the subject of Houston, and "the filing of an administrative claim." Tapia-Ortiz v. Doe, 171 F.3d 150, 152 (2d Cir. 1999). However, the Second Circuit agreed, in line with Petitioner's argument, that "Houston does not apply, of course, when there is a specific statutory regime to the contrary." Id. at 152 n.1 (citing Fex, 507 U.S. at 43). Thus, the Second Circuit's holding seemingly hinges on a specious

distinction between administrative regulations and statutes. The FTCA's administrative requirements are "issued by an agency pursuant to statutory authority," thereby giving them "the force and effect of law." Chrysler Corp. v. Brown, 441 U.S. 281, 302–03 (1979); 28 U.S.C. § 2672. Accordingly, the Second Circuit's conclusion was flawed and should not be followed.

The Seventh Circuit held that Houston applies to FTCA claims for two reasons: first, because to hold otherwise suggests that Fex silently overruled Houston, Censke v. United States, 947 F.3d 488, 492 (7th Cir. 2020), and second, because it read Fex to call for an interest-balancing analysis which, in the case of inmate FTCA claims, favors claimants like Young. Id. at 492–93.

Both rationales are unpersuasive. First, as discussed in Part IV.A., Petitioner's reading of Fex is perfectly compatible with Houston. The Seventh Circuit tries to reconcile the cases by claiming that policy considerations absent from Fex gave the Houston Court "sufficient basis to depart from the receipt-based rule applicable 'in the ordinary civil case.'" Id. at 491 (citing Houston, 487 U.S. at 273). If this were true, the Houston Court would have simply said so, rather than dwelling on the Federal Rules' textual ambiguity before eventually turning to policy and fairness. Houston, 487 U.S. at 274. Second, the Seventh Circuit's assertion that Fex espouses an interests-balancing approach is incorrect. The Fex Court considered the balance of harms only as an interpretive aid, and only because "the text alone [was] indeterminate." Fex, 507 U.S. at 52 (rejecting inquiries as to "fairness"). The Seventh Circuit's construal of Fex and Houston as being about balancing the parties' interests is an unfounded judicial outlier that should not be followed.

CONCLUSION

For the foregoing reasons, Respondent's invocation of the prison mailbox rule does not apply to the FTCA's statute of limitations, which is controlling under Houston and Fex. The Court should therefore reinstate the district court's grant of summary judgment for Petitioner.

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Date of JD/LLB	**May 23, 2024**
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Journal(s)	**Harvard Journal of Law and Technology** **Harvard Negotiation Law Review** **Harvard Journal of Law and Technology** **Harvard Negotiation Law Review**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Timothy James Kelly
United States District Court, District of Columbia
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Dear Judge Kelly:

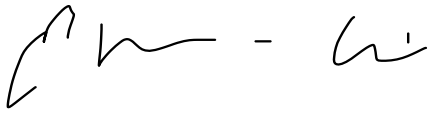
I am writing to apply for your next available clerkship beginning after I graduate in May 2024. I am currently a rising third year student at Harvard Law School. Enclosed are my resume, transcripts, and writing sample. My co-worker, Angela Seeger, interned in your office this past semester and speaks extremely highly of you. The following professors are submitting letters of recommendation and are open to inquiries as well:

Professor Martha Minow minow@law.harvard.edu 617-495-4276	Professor Daphna Renan drenan@law.harvard.edu 617-495-8218	Professor Noah Feldman nfeldman@law.harvard.edu 617-495-9140

In my time with Free Speech for People and Protect Democracy, I developed strong legal research, writing, and analytical skills. My work at both organizations focused on impact litigation, which required creative thinking, close reading, and deep analysis to develop novel arguments. At Paul, Weiss, I now am experiencing a more client-driven approach to law through work on both trial and appellate litigation as well as restructuring matters. Finally, as a teacher, I learned to explain complex issues to people at different levels of understanding under intense pressure—something I have found invaluable in my legal experience thus far.

Thank you for your consideration.

Sincerely,



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Enclosures

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- 1L Reading Group, *Rebooting Social Media*
- *Harvard Negotiation Law Review*, 1L Subciter
- *Journal of Law and Technology*, 1L Subciter
- Women's Law Association

Relay Graduate School of Education, New York, NY
M.A.T., Adolescent Education Chemistry (Grades 7-12), June 2021

Harvard College, Cambridge, MA
A.B., cum laude *in Chemistry, Secondary Field in Government*, May 2019
Activities:
- *Harvard Political Review*, Associate Design Editor
- Harvard Challah for Hunger, Director of Marketing and Sales
- Harvard CIVICS, Teacher
- Harvard Model United Nations, Assistant Director

EXPERIENCE

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York, NY — Summer 2023
Summer Associate
- Research procedural and jurisdictional issues in ongoing appellate and trial court litigation.
- Prepare motions for use in ongoing restructuring matters.

Protect Democracy, Cambridge, MA — Summer 2022
Clinical Student
- Developed litigation strategy for potential suit on state constitutional and statutory grounds through the Democracy and the Rule of Law Clinic.
- Researched and drafted elements of future white paper related to state-specific voting systems.

Free Speech for People, Newton, MA — Summer 2022
Legal Intern
- Conducted research related to ongoing and potential litigation for organization focused on election protection and campaign finance reform.
- Evaluated prospective fora for future litigation based on local election law.
- Coordinated with other legal interns on overlapping areas of research related to voter intimidation statutes.

Urban Assembly School for Applied Math and Science, New York, NY — 2019 – 2021
11th/12th Grade Earth Science and Chemistry Teacher, Advisor, Teach for America Corps Member
- Developed, planned, and taught lessons in 11th grade Earth Science and 12th grade Chemistry for ~100 students.
- Created a system of remote learning and facilitated the transition during school closure due to Covid-19.
- Advised sixteen students on academic and social success during their first two years of high school.
- Participated in an intensive summer training program while teaching a summer school class in high school Biology.

Legal Outreach, New York, NY — Summer 2018
CPIC Summer Teaching Fellow
- Planned and taught course on college skills for fifty rising high school seniors at a college-access nonprofit through Mindich Service Fellowship.

PERSONAL

Enjoy plant-forward cooking, baking, hot vinyasa yoga, and creative writing.

Harvard Law School

Date of Issue: June 7, 2023
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Page 1 / 2

Record of: Erica F Newman-Corre
Current Program Status: JD Candidate
Pro Bono Requirement Complete

JD Program

Fall 2021 Term: September 01 - December 03

1000	Civil Procedure 4 Cohen, I. Glenn	H	4
1001	Contracts 4 Elhauge, Einer	H	4
1006	First Year Legal Research and Writing 4A Medley, Shayna	P	2
1004	Property 4 Singer, Joseph	H	4
1005	Torts 4 Lazarus, Richard	P	4

Fall 2021 Total Credits: 18

Winter 2022 Term: January 04 - January 21

1051	Negotiation Workshop Spivakovsky-Gonzalez, Pedro	CR	3

Winter 2022 Total Credits: 3

Spring 2022 Term: February 01 - May 13

2753	Advertising Law Tushnet, Rebecca	H	3
1024	Constitutional Law 4 Minow, Martha	P	4
1002	Criminal Law 4 Crespo, Andrew * Dean's Scholar Prize	H*	4
1006	First Year Legal Research and Writing 4A Medley, Shayna	H	2
1003	Legislation and Regulation 4 Renan, Daphna * Dean's Scholar Prize	H*	4

Spring 2022 Total Credits: 17
Total 2021-2022 Credits: 38

Fall 2022 Term: September 01 - December 31

2035	Constitutional Law: First Amendment Feldman, Noah	H	4
2048	Corporations B Spamann, Holger	P	4
2197	Patent Law Bagley, Margo	H	3
3141	The Judicial Role in a Democracy Abella, Rosalie Silberman	H	2

Fall 2022 Total Credits: 13

Winter 2023 Term: January 01 - January 31

2016	The Role of the Article III Judge Griffith, Thomas	H	2

Winter 2023 Total Credits: 2

Spring 2023 Term: February 01 - May 31

2000	Administrative Law Vermeule, Adrian	P	4
8049	Democracy and the Rule of Law Clinic Schwartztol, Larry * Dean's Scholar Prize	H*	3
3011	Framing, Narrative, and Supreme Court Jurisprudence Jenkins, Alan	H	2
2994	Legal Tools for Protecting Democracy and the Rule of Law in America Schwartztol, Larry	H	2
2213	Public Law Workshop Minow, Martha	H	2

Spring 2023 Total Credits: 13
Total 2022-2023 Credits: 28

Fall 2023 Term: August 30 - December 15

2043	Copyright and Trademark Litigation Cendali, Dale	~	2
2076	Ethics, Economics and the Law Sandel, Michael	~	2
2086	Federal Courts and the Federal System Goldsmith, Jack	~	5
7000W	Independent Writing Minow, Martha	~	2
3241	Privacy Law Nielsen, Aileen	~	4
3500	Writing Group: Public Values Conflicts: Constitutional Law, or Education Law, or Social Media Regulation Minow, Martha	~	1

Fall 2023 Total Credits: 16

continued on next page

Assistant Dean and Registrar

Harvard Law School

Record of: Erica F Newman-Corre

Date of Issue: June 7, 2023
Not valid unless signed and sealed

Winter 2024 Term: January 02 - January 19

2169	Legal Profession: Government Ethics - Scandal and Reform Rizzi, Robert	~	3
	Winter 2024 Total Credits:		3

Spring 2024 Term: January 22 - May 10

2079	Evidence Whiting, Alex	~	3
2212	Public International Law Blum, Gabriella	~	4
	Spring 2024 Total Credits:		7
	Total 2023-2024 Credits:		26
	Total JD Program Credits:		92

End of official record

Assistant Dean and Registrar

HARVARD LAW SCHOOL
Office of the Registrar
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Cambridge, Massachusetts 02138
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www.law.harvard.edu
registrar@law.harvard.edu

Transcript questions should be referred to the Registrar.

~~~~~~

In accordance with the Family Educational Rights and Privacy Act of 1974, information from this transcript may not be released to a third party without the written consent of the current or former student.

~~~~~~

A student is in good academic standing unless otherwise indicated.

Accreditation

Harvard Law School is accredited by the American Bar Association and has been accredited continuously since 1923.

Degrees Offered

J.D. (Juris Doctor)
LL.M. (Master of Laws)
S.J.D. (Doctor of Juridical Science)

Current Grading System

Fall 2008 – Present: Honors (H), Pass (P), Low Pass (LP), Fail (F), Withdrawn (WD), Credit (CR), Extension (EXT)

All reading groups and independent clinicals, and a few specially approved courses, are graded on a Credit/Fail basis. All work done at foreign institutions as part of the Law School's study abroad programs is reflected on the transcript on a Credit/Fail basis. Courses taken through cross-registration with other Harvard schools, MIT, or Tufts Fletcher School of Law and Diplomacy are graded using the grade scale of the visited school.

Dean's Scholar Prize (*): Awarded for extraordinary work to the top students in classes with law student enrollment of seven or more.

Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
May 2011 - Present

Summa cum laude	To a student who achieves a prescribed average as described in the Handbook of Academic Policies or to the top student in the class
Magna cum laude	Next 10% of the total class following *summa* recipient(s)
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

All graduates who are tied at the margin of a required percentage for honors will be deemed to have achieved the required percentage. Those who graduate in November or March will be granted honors to the extent that students with the same averages received honors the previous May.

Prior Grading Systems

Prior to 1969: 80 and above (A+), 77-79 (A), 74-76 (A-), 71-73 (B+), 68-70 (B), 65-67(B-), 60-64 (C), 55-59 (D), below 55 (F)

1969 to Spring 2009: A+ (8), A (7), A- (6), B+ (5), B (4), B- (3), C (2), D (1), F (0) and P (Pass) in Pass/Fail classes

Prior Ranking System and Rules for Determining Honors for the JD Program
Latin honors are not awarded in connection with the LL.M. and S.J.D. degrees.
Prior to 1961, Harvard Law School ranked its students on the basis of their respective averages. From 1961 through 1967, ranking was given only to those students who attained an average of 72 or better for honors purposes. Since 1967, Harvard Law School does not rank students.

1969 to June 1998	General Average
Summa cum laude	7.20 and above
Magna cum laude	5.80 to 7.199
Cum laude	4.85 to 5.799

June 1999 to May 2010
Summa cum laude General Average of 7.20 and above (exception: *summa cum laude* for Class of 2010 awarded to top 1% of class)

Magna cum laude	Next 10% of the total class following *summa* recipients
Cum laude	Next 30% of the total class following *summa* and *magna* recipients

Prior Degrees and Certificates
LL.B. (Bachelor of Laws) awarded prior to 1969.
The I.T.P. Certificate (not a degree) was awarded for successful completion of the one-year International Tax Program (discontinued in 2004).

June 05, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I write enthusiastically in support of Erica Newman-Corré, a rising 3L at Harvard Law School who has applied for a clerkship in your chambers.

I got to know Erica as a student in my Legislation and Regulation class in the spring semester of her 1L year. Legislation and Regulation is a required course that our 1Ls take to provide them with an introduction to lawmaking in the administrative state. The course explores the theory and practice of legal interpretation by courts and agencies, as well as the structural and procedural dimensions of administrative governance under the U.S. Constitution and the Administrative Procedure Act.

Erica was a standout student in the class from the get-go, and she wrote one of the strongest exams in her class. During class discussions, Erica delved into the material and she regularly made insightful observations that advanced our assessment of statutory interpretation theory and our analysis of doctrinal wrinkles in administrative and structural constitutional law. She was consistently prepared, and she responded to “cold calls” incisively.

Given her contributions throughout the semester, I was not surprised that Erica wrote a standout exam. (Our exams are graded anonymously.). On the exam, Erica was able to identify and to assess, accurately and insightfully, a range of difficult issues at the intersection of administrative and constitutional law. She also crafted a responsive, nuanced, and sophisticated statutory interpretation argument that deployed multiple tools of interpretation in a thoughtful and persuasive manner. Her exam essays were well written and well organized. Erica’s exam earned her a Dean’s Scholar Prize in the course. The Dean’s Scholar Prize is HLS’s version of an A+, which faculty are permitted to award to very few students even in our large doctrinal courses. Erica’s exam easily met this rigorous standard.

Erica’s strong analytical chops, her thorough treatment of course materials, and her terrific writing skills lead me to recommend her enthusiastically for this clerkship. Thank you for considering Erica’s application. If I can provide you with additional information, please do not hesitate to let me know.

Sincerely yours,

Daphna Renan

Daphna Renan - drenan@law.harvard.edu - 617-495-8218

June 05, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I write with my enthusiastic support for Erica Newman-Corré as she applies to serve as your law clerk. From her work in two of my courses and conversations outside of class, I have confidence that she would be an outstanding clerk.

In my 80-person Constitutional Law course during her first year here, she was an active and valuable class participant who invariably showed impressive knowledge of the material and also an active, inquisitive mind. I require each student to participate in a simulation of an oral argument or legislative drafting session. Her case was a Dormant Commerce clause problem involving an inventive but ultimately inadequate effort to expand the doctrine to forbid application of California wage and hour laws to flight attendants on flights departing from California when they were employed by an airline not based in California and involving workers whose significant work hours occurred outside the State. Occurring early in the semester, this exercise required participating students to understand the arguments for expanding the doctrine, to make sense of a complex appellate decisions and petitions and responses regarding the application for certiorari, and to convey succinctly responses to questions from the simulated Supreme Court argument in class. Erica was memorably effective: clear, cogent, able to acknowledge tensions in the analysis, and fully responsive to questions. In the pre-class written submission, her work was similarly impressive, and so was the post-class reflection on unexpected issues that arose. She also volunteered questions enriching the simulations involving other students with her distinctive precision. All and all, I thought of her as one of the strongest members of a quite terrific class of 80 students. When I looked up who had received what grade following grading the written exams of submissions identified solely with students' identification numbers, I was disappointed and frankly surprised that her exam scored too low to receive an Honors grade. I believe that her performance during class sessions is a better indication of her abilities. Her excellent transcript offers confirmation.

Dean John Manning and I selected Erica from a large group of applicants to be one of 21 students in an advanced workshop on public law. There, each week, a professor presents a draft or published law review article or book chapter and the students and other faculty provide questions, comments, add suggestions. Erica has been an avid and constructive participant. Her precision has now been enriched with greater depth and awareness if competing considerations.

Erica has sought out opportunities to develop her skills in research and argumentation. Through summer work with a voting rights and campaign finance litigation she worked on a variety of matters, notably many involving procedural doctrines. Through her work at our Democracy and Rule of Law clinic, she developed a litigation strategy for a potential state lawsuit and contributed to upcoming publications. Through these efforts, she has become quite sophisticated and professional in her approach to research, writing, and legal analysis. Her rigor, honed by her undergraduate chemistry concentration, is now well enriched with fine experience with and knowledge of legal institutions and techniques of persuasion.

The entire law school community has benefited from Erica's leadership in student organizations and engagement in community events. She has been a board member of the Jewish Law Students Association and a board member of the Equal Democracy Project. She is someone who has independence but also strong team-work abilities. Her clarity and maturity are real assets.

I predict that she will become a litigator. Her interests are many; her intellectual curiosity is profound. Her love of learning is one of the reasons I predict she would be not only a fine law clerk not only because of her the work she will produce, but also because of the delight she brings to all she does.

Sincerely,

Martha Minow
300th Anniversary University Professor
Former Dean
Harvard Law School

Martha Minow - minow@law.harvard.edu - 617-495-4276

June 05, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Dear Judge Kelly:

I write to recommend Erica Newman-Corré for a clerkship in your chambers. Let me say right up front that I am extraordinarily enthusiastic about her legal and overall intelligence, her commitment to public service, her humorous, engaging style, and her great seriousness of purpose. She is going to be the favorite law clerk in whatever chambers she finds herself working -- both for her substantive excellence and for her personality. Erica is a true gem, and you should hire her.

I first met Erica when, as a senior in Harvard College, she petitioned to take my constitutional law course at the law school. I've been a law professor since 2001 and have taught at Harvard Law since 2007, and no undergraduate had ever asked to take one of my law courses before. I said yes, after first telling her that the course would be hard and that I expected her to participate fully like any other graduate student.

I'm so glad that I did. Here is what I wrote about her performance when she was applying to law schools:

"Erica is a brilliant young woman who was already the standout student in my large constitutional law course when she took it in 2019. She was stronger than any of the Harvard Law students in the course – and they knew it. When she spoke, people at first thought she was a spectacular law student whom they didn't know, maybe a transfer. Eventually someone asked her who she was, and she admitted to being a senior at Harvard College majoring in … chemistry. The other students were kind of awed. So was I. I tried hard not to favor her in class, but when no one else could come up with an answer to a question, she always could, and always did. That made her excellence a matter of public record. Her exam would have been an A+ if we were allowed to give that grade."

Since then, I've gotten to know Erica even better. She was a standout student in my First Amendment course in 2022. We have spent lots of time chatting in office hours and in the context of events that she organized around the law school.

The constant theme that emerges from my interactions with Erica is that she has an extraordinarily sharp, precise analytic mind -- the kind you need to be a successful undergraduate chemistry major. Yet she is also simultaneously capable of breadth and creativity. She is curious and can take on any challenge with commitment and capacity.

No matter how serious the task, Erica is also unfailingly cheerful and funny. She's got an infectious smile and an infectious sense of fun. You can imagine that she was a terrific Teach For America instructor – even during the pandemic.

In short, Erica combines fantastic legal mind with seriousness of purpose and a truly phenomenal attitude. She is going to craft a fascinating and distinctive career for herself. Along the way, she will bring excellence and joy to her professional environment. I urge you to interview her and see what a fun, smart person she is.

Yours sincerely,
Noah Feldman
Felix Frankfurter Professor of Law
Harvard Law School
Cambridge, MA 02138

Noah Feldman - nfeldman@law.harvard.edu - 617-495-9140

Erica Newman-Corré
20 Chauncy St., Apt. 5 • Cambridge, MA 02138 • (917) 751-6110 • enewmancorre@jd24.law.harvard.edu

Writing Sample

This was my final paper for The Judicial Role in a Democracy, a Fall 2022 course taught by Justice Rosalie Abella, formerly of the Supreme Court of Canada.

"Neither Jew nor Gentile, Neither Catholic nor Agnostic"[1]

Facing and Addressing the Perception of Religious Decision-Making in the Federal Judiciary

The use of religion in judicial decisions is a hotly contested subject. Some argue that it should be absolutely forbidden,[2] some that religion is a valuable influence,[3] and others still take middle grounds, offering contexts where it may be permissible[4] or arguing that although it's not desirable, it is unavoidable.[5] However, the reality of whether judges should or do use their religion is not the only issue in play. There is also a widespread belief that religion influences judges as they decide cases, which generates two major problems. First, it delegitimizes the court system by creating the appearance, whether accurate or not, that personal preferences, rather than legal principles, drive the decisions. Second, it lends itself to attacks on important values of a liberal democracy, including freedom of conscience and nondiscrimination. Addressing these ill effects could be done either by changing the behavior of the judges or by adjusting how the public understands the process to increase confidence. However, directly targeting religious decision-making poses practical and constitutional challenges. It also may be less normatively desirable than it seems at first glance, even for those who object to judges' use of religion. Therefore, options for addressing the perception, rather than the decision-making itself, should be the primary focus for attempts to fix the problems flowing from the belief. Possibilities for this include reform of the nomination process, shifts in the way judgments are written to increase transparency and provide a variety of reasons, and increased use of voluntary recusal.

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[1] *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting) (discussing how though his experience as a Jew makes him sympathetic to Barnette, the law demands a different result).

[2] Margot G. Benedict, Note, *Curbing Religion's Influence on the Judiciary*, 29 Geo. J. Legal Ethics 793, 796–800 (2016).

[3] Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 Marq. L. Rev. 513, 521 (1998).

[4] Kent Greenawalt, *Private Consciences and Public Reasons* 149–50 (1995)

[5] Stephen L. Carter, *The Religiously Devout Judge*, 64 Notre Dame L. Rev. 932, 944 (1989)

I. The Perception of Religious Influence on Judges

Americans believe, rightly or wrongly, that judges make decisions based on their own personal religious beliefs. Three case studies demonstrate this perception: (1) the questioning of judicial candidates during their confirmation hearings; (2) the media coverage of *Dobbs v. Jackson Women's Health*; and (3) motions for recusal. In addition to reflecting the perception, these examples illustrate the problems arising from the widespread belief in the existence of judicial religious action. First, it challenges the legitimacy of the court, and second, it results in actions that are inconsistent with the liberal values of religious freedom, independence between church and state, and nondiscrimination.

A. Evidence of the Perception

While the United States is substantially more religious than most of its peer countries,[6] its judiciary is even more so. In 2016, not a single federal judge identified their religion as atheist, agnostic, or nothing, while approximately 23% of the country used one of those labels in 2015.[7] It is not only that judges are more religious. There also exists a perception that judges are influenced by their religion in their work: 44% of Americans think Supreme Court justices have relied too much on their religious belief in recent decisions.[8] Three interactions between the judiciary and various American constituencies demonstrate this belief.

First, questions about religion have become a standard part of the confirmation process, and arguably are at its heart: the first confirmation hearing was for Louis Brandeis, the first

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[6] Dalia Fahmy, *Americans are far more religious than adults in other wealthy nations*, Pew Research Center, https://www.pewresearch.org/fact-tank/2018/07/31/americans-are-far-more-religious-than-adults-in-other-wealthy-nations/ (July 31, 2018)

[7] Sepehr Shahshahani and Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. of Empirical Legal Stud. 716, 724 (2017).

[8] Patricia Tevington, *Growing share of Americans see the Supreme Court as 'friendly' toward religion*, Pew Research Center, https://www.pewresearch.org/fact-tank/2022/11/30/growing-share-of-americans-see-the-supreme-court-as-friendly-toward-religion/ (Nov. 30, 2022).

Jewish Supreme Court nominee.[9] During her recent confirmation hearing, now-Justice Ketanji Brown Jackson was questioned repeatedly on her religious affiliation (she identifies as a nondenominational Protestant but refused to rank her religiosity on a scale from one to ten).[10] This line of inquiry, according to Senator McConnell, was in response to similar questioning of now-Justice Amy Coney Barrett over her religion, and in particular, her affiliation with the People of Praise, a Christian community, during her nomination to the Court of Appeals for the Seventh Circuit.[11] Justice Barrett, however, was not the first to be questioned on her religion—now-Justice Roberts was asked about his religion in 2005 and now-Judge Pryor's confirmation to the Eleventh Circuit nearly failed because of his.[12] In now-Justice Kagan's confirmation hearings, her religion was raised twice: first in the context of her admiration for Israeli Justice Aharon Barak, and later in her lighthearted answer to a question about what she had been doing the previous Christmas.[13] Though less intense than the questions at Barrett and Jackson's hearings, the fact that it was raised at all does indicate that the United States Senate views religion as at least somewhat relevant to the job.

Second, media discussion of recent Supreme Court decisions indicate that at least some segments of the United States population view the religion of the justices as influential in their decision-making. This topic has arisen most notably in relation to *Dobbs v. Jackson Women's*

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[9] Ronald G. Shafer, *The first Jewish justice was also the first to face confirmation hearings*, Washington Post (April 4, 2022, 7:00 AM)), https://www.washingtonpost.com/history/2022/04/04/louis-brandeis-jewish-confirmation-hearings/?request-id=6270b893-f3ce-4aff-bbc2-8996910a2810&pml=1.

[10] Amy B. Wang, *Sen. Graham presses Ketanji Brown Jackson to rate her religious faith 'on a scale of 1 to 10,'* Washington Post (Mar. 22, 2022, 1:47 PM), https://www.washingtonpost.com/politics/2022/03/22/sen-lindsey-graham-ketanji-brown-jackson-questioned-religious-faith-scale-one-10/.

[11] *Id.*

[12] Kyle Smith, Note, *The Dogma Lives Loudly within Them: Revisiting the Role of the No Religious Test Clause in Senate Confirmation Hearings*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 313, 323 (2019) [hereinafter Smith, *The Dogma Lives Loudly*].

[13] The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary, 111 Cong. 129 (2010); *id.* at 144.

Health, 142 S.Ct. 2228 (2022), where a substantial portion of the coverage focused on the majority's faith.[14] The *Associated Press* published an article entitled "Anti-Roe justices a part of Catholicism's conservative wing," in which the author analyzed each member of the majority's Catholic pedigree.[15] While the article does note famously pro-choice Catholics, including Justice Sotomayor who dissented in *Dobbs* and President Joe Biden, it strongly implies that the majority's religion was important to their decision, if not determinative.[16] A guest essay in *The New York Times* made the allegation even more directly. Linda Greenhouse wrote

> No one really buys the argument that what was "egregiously wrong" with Roe v. Wade, to quote the Dobbs majority, was the court's failure to check the right analytic boxes. It was not constitutional analysis but religious doctrine that drove the opposition to Roe…
>
> ……
>
> Justice Alito took pains to present the majority's conclusion as the product of pure legal reasoning engaged in by judges standing majestically above the fray of Americans' "sharply conflicting views" on the "profound moral issue" of abortion, as he put it in the opinion's first paragraph. And yet that very framing, the assumption that the moral gravity of abortion is singular and self-evident, gives away more than members of the majority, all five of whom were raised in the Catholic Church, may have intended…
>
> ……
>
> There is another norm, too, one that has for too long restrained the rest of us from calling out the pervasive role that religion is playing on today's Supreme Court. In recognition that it is now well past time to challenge that norm, I'll take my own modest step and relabel Dobbs for the religion case that it is, since nothing else explains it.[17]

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[14] This section is not to say that those who attribute *Dobbs* to the Justices' Catholicism are incorrect; rather, it is focusing on the perception.

[15] Peter Smith, *Anti-Roe justices a part of Catholicism's conservative wing*, Associated Press, https://apnews.com/article/abortion-supreme-court-catholic-ee063f7803eb354b4784289ce67037b4 (June 30, 2022)

[16] *See id.*

[17] Linda Greenhouse, *Religious Doctrine, Not the Constitution, Drove the Dobbs Decision*, N.Y. Times, https://www.nytimes.com/2022/07/22/opinion/abortion-religion-supreme-court.html (July 22, 2022)

In blaming the decision on the Justices' Catholicism in a public forum, Greenhouse both reflects and promotes the perception of religious decision-making. It was not only traditional news outlets and court-watchers noting this facet of the Court's decision. This version of the decision was also prominent on social media, sometimes in overtly anti-Catholic ways.[18]

Finally, there is a troubling phenomenon of parties in lawsuits motioning for recusal on the basis of the judge's religion. *See, e.g.*, *Idaho v. Freeman*, 507 F.Supp 706, 710 (D. Idaho 1981) (holding that judge is not required to recuse himself in due to membership in the Church of Latter Day Saints which had taken position on issue in case); *Menora v. Ill. High School Ass'n*, 527 F.Supp. 632, 634 (N.D. Ill. 1981) (holding similarly for Jewish judge in case with Jewish plaintiffs). While courts have consistently held that this is not a reason for requiring recusal, it continues to be raised occasionally. *See, e.g.*, *United States v. Odeh*, No. 13–cr–20772, 2014 WL 3767808, at *1 (E.D. Mich. 2014). Though this issue is less visible than the other two examples, it reflects the real-world effects of this perception. It's not simply that observers post hoc believe that a judge's decision was affected by their religion—parties, coming before the American judiciary, believe that they may not be fairly heard because of the religion of the judge.

B. Problem of Legitimacy

This perception is problematic in a democracy for two major reasons. First, it threatens the legitimacy of the judiciary, specifically its sociological legitimacy, which is the extent to which the public approves of the institution as a decision-maker.[19] Though historically, the

[18] *See, e.g.*, @BronxyBoy666, Twitter (Jun. 24, 2022, 10:29AM) https://twitter.com/BronxyBoy666/status/1540341425161834501. ("This is why the earliest Americans did not want Catholics stepping foot in this country."). While most tweets regarding the Justices' religion had minimal engagement and were less virulent, there were numerous tweets on the subject.

[19] *See* Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court, 21 (2018)

United States Supreme Court and federal judiciary at large have enjoyed high levels of sociological legitimacy, that public support has been declining, even before *Dobbs*.[20] Some research suggests that *Dobbs* itself was an unprecedented blow to the legitimacy of the Court, despite a general belief that individual cases do not have large effects on institutional legitimacy—even *Bush v. Gore* did not have similar effects.[21] The belief that judges use their own religion in deciding issues of national importance may be a contributing factor to this unusual noticeable drop. While *Bush v. Gore* suggested partisan influence and was arguably more undemocratic than *Dobbs*, religious decision-making in the governmental sphere is anathema to most Americans—83% of Americans think that Supreme Court justices should not bring their religious views into their decisions.[22] With that strong preference for a secular judiciary and 44% of the public thinking religion has been overused by the Court in recent decision,[23] this problem contributes to the crisis of legitimacy. This declining legitimacy presents a problem for the Court and American democracy, as the legitimacy of the judiciary contributes to cooperation with the democratic system and pro-social behavior.[24] Given the importance of judicial legitimacy in promoting a stable democracy, this factor in the declining legitimacy of the courts is a major concern.

C. Problem of Values

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[20] *Id.* at 156 (comparing 45% approval rating in 2015 to 74% in September 2001, nine months after the decision in *Bush v. Gore*)

[21] Gibson, James L., Losing Legitimacy: *Has Dobbs Undermined Popular Support for the U.S Supreme Court?*, 29–30, 5 (September 1, 2022). Available at SSRN: https://ssrn.com/abstract=4206986 or http://dx.doi.org/10.2139/ssrn.4206986. *See also* Kathryn Haglin, Soren Jordan, Alison Merrill, & Joseph Daniel Ura, *Americans don't trust the Supreme Court. That's dangerous.* THE WASHINGTON POST, https://www.washingtonpost.com/politics/2022/10/10/supreme-court-public-opinion-legitimacy-crisis/ (Oct. 10, 2022) (increased link between ideology and approval suggests decline in diffuse support/legitimacy).

[22] Tevington, *supra* note 8.

[23] *Id.*

[24] *See* Tom R. Tyler & Jonathan Jackson, *Popular Legitimacy and the Exercise of Legal Authority: Motivating Compliance, Cooperation and Engagement*, 20 PSYCHOLOGY, PUBLIC POLICY, AND LAW 78, 89 (2013).

This belief around religious decision-making among judges also leads to attacks on fundamental liberal values, namely the separation of church and state (or anti-Establishment, to borrow from the U.S. Constitution), freedom of religion/belief/conscience (Free Exercise), and antidiscrimination.[25] Confirmation questioning on religion strongly implicates anti-Establishment concerns. It inserts the religions of its officials into government proceedings, opening the door to allowing only those in the religious orthodoxy, or those who are viewed as sufficiently benign to that group, to serve as judges. The Free Exercise issues are even broader—both the questioning around religious beliefs in confirmation hearings and the motions for recusal discussed above threaten to chill religious exercise. If someone expects their deeply held spiritual beliefs to be questioned and to potentially disqualify them from their role, they are likely to minimize the ways in which those beliefs differ from those of the average person in the United States Congress or in their courtroom. Our religious diversity cannot survive that type of coerced assimilation.

That assimilationist tendency also demonstrates why antidiscrimination principles are at stake here—these concerns around religious influence tend to disproportionately affect those who are outside the majority. In eight cases where judges were asked to recuse themselves on the basis of their religion (or a belief associated with their religion), four of the judges were Jewish, two Mormon, one Catholic, and one Episcopalian. *United States v. Odeh*, No. 13–cr–20772, 2014 WL 3767808, at *1 (E.D. Mich. 2014) (Jewish); *United States v. Nelson*, No. CR–94–823 (DGT), 2010 WL 2629742, at *1–3 (E.D.N.Y. 2010) (same); *U.S. v. El-Gabrowny*, 844 F.Supp. 955, 957 (S.D.N.Y. 1994) (same); *Menora*, 527 F.Supp. at 633 (same); *Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) (Mormon); *Freeman*, 507 F.Supp. at 710 (same); *Feminist*

[25] *See generally* Samuel Freeman, *Liberalism*, *in* OXFORD RESEARCH ENCYCLOPEDIAS, POLITICS. (Retrieved 27 Nov. 2022). Available at: https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-236

Women's Health Center v. Codispoti, 69 F.3d 399, 400 (9th Cir. 1995) (Catholic); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 660 (10th Cir. 2002) (Episcopalian). Except for the single case about an Episcopalian judge, there were no available cases where a mainline or evangelical Protestant was asked to recuse themselves. Further, although Mormons made up only 5.1% of the federal judiciary in 2016[26] (and likely an even smaller proportion in the 1980s, when *Singer* and *Freeman* were decided), they represented 25% of the challenges, and although Jewish judges in the same year were 19% of the federal judiciary, 50% of the challenges were against Jewish judges. The burden imposed by the belief in religious decision-making is not borne equally by judges of all faiths, raising the specter of discrimination.

II. The Problems with Direct Action Against Judicial Use of Religion

There is an underlying reality to this perception. However, addressing that directly, rather than countering the perception, poses several difficulties that make that course of action impossible or undesirable. As an initial challenge, the data on the phenomenon of religious decision-making is not sufficiently definitive as to lend itself to clean solutions and separating out religious from other moral decisions is a challenge. There are also constitutional concerns raised by state involvement in religious practices. Finally, the same liberal values attacked by the perception are implicated in a direct approach—rules or guidelines to address this may lead to increased religious discrimination, rather than less, making it normatively undesirable.

A. Practical Concerns

Despite the desirability of addressing the problem at its source, changing how judges make their decisions to exclude religious influence is challenging because of the difficulties in measuring the phenomenon and the reality of how religion fits into the moral landscape.

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[26] Shahshahani and Liu, *supra* note 7, at 724.

Empirically, it's not clear if, how, and to what extent religion plays a role in these judgments. While empirical studies do suggest that religion is correlated with decisions in certain types of cases, the scope is trickier—at least one study found that some of the differences between Catholic and Protestant judges were eliminated when the researcher controlled for party affiliation.[27] There is also the broader issue of correlation and causation. While Jewish judges sometimes vote differently than Christian ones,[28] it's not necessarily because one side or the other is using their religious values to determine the outcome of these cases. Jewish judges may vote differently on questions of religious tolerance[29] not because God told them to, but because their experience as a member of a minority religion informed their understanding of the situation and led them to more strongly endorse the separation of church and state. Just as Justice Sonia Sotomayor's experience as a Latina woman informs her role,[30] a Jewish judge, a Mormon judge, or a Catholic judge may be influenced by their experience. The disparities in their decisions may come from their divergent lives, rather than any sort of religious doctrine, and life experience, far from disqualifying, is a desirable feature in a judge

Beyond the empirical doubts remaining in the data, it may not be possible for judges raised religiously or in the Christian cultural milieu to separate their own moral beliefs from the doctrines of their faith. While it is possible to have morality without religion, once the two

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[27] Lee Epstein and Eric A. Posner, *The Roberts Court and the Transformation of Constitutional Protections for Religion: A Statistical Portrait*, 2021 Sup. Ct. Rev. 315, 332 (2021) (identifying Catholics as a distinct bloc); Shahshahani and Liu, *supra* note 7, at 727 (noting no statistically significant difference between Catholic and Protestant judges in religious liberties cases).

[28] Shahshahani and Liu, *supra* note 7, at 727.

[29] *Id.*

[30] Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Committee on the Judiciary, 111 Cong. 326–27 (2009) (speaking about the importance of experience for judges while being questioned about her "wise Latina" speech). *See also* Honorable Kermit V. Lipez, *Is There A Place For Religion In Judicial Decision-Making?*, 31 Touro L. Rev. 133, 143–44 (2014) (discussing same).

coexist, they do not lend themselves to neat separation. Consider, for example, a judge, raised Catholic, who opposes the death penalty. While that judge may justify that position through any of the other arguments against capital punishment (the risk of error, the cost, the limited and unproven deterrence), it does not change the fact that they, in their early life in church, Catechism classes, or parochial school, were exposed to a religious doctrine that shares, and likely informed, if only subconsciously, that view. If any moral considerations are accepted as part of the judicial process, it is difficult, if not impossible, to remove all religious suggestion, at least for religious judges.[31] If we created a rule for judges around using religion, even a scrupulous judge may struggle to obey.

B. Constitutional Challenges

In addition to the practical concerns, two clauses of the United States Constitution may prevent directly addressing religious decision-making. The first is Article VI, Clause 3.2, the Religious Tests Clause: "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Designed to protect religious liberty, an "important right of human nature,"[32] this clause clearly applies to federal judges. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2051–53 (2018) (defining an officer, for the purpose of the Appointments Clause, as one in a continuing office with significant authority). While the most obvious context in which to consider this clause is confirmation hearings,[33] judges, upon being asked to recuse themselves, have suggested that mandating recusal runs afoul of this prohibition. *Codispoti*, 69 F.3d at 401.

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[31] Griffen, *supra* note 3, 515–16 (Judge and Baptist preacher arguing for the inseparability). *See also* Carter, *supra* note 5, 944; Candyce T. Beneke, *The Separation off Personal Religious Faith And Professional Identity-- Is This Really Possible? Is It Truly Desirable?*, 41 S. Tex. L. Rev. 1423, 1429–30 (2000).

[32] Oliver Ellsworth, *A Landholder VII*, December 17, 1787. Available at https://teachingamericanhistory.org/document/a-landholder-vii/ (accessed November 29, 2022).

[33] *See generally*, Smith, *The Dogma Lives Loudly*, *supra* note 12.

("This contention [that the judge must recuse himself from a case due to his religious beliefs] stands in conflict with the principle embedded in Article VI.") A broad mandate prohibiting judges from using their religion by the government itself may similarly offend the Constitution by preventing judge's from serving on certain cases or at all because of their religious beliefs.

The Free Exercise Clause also poses a challenge for those seeking an outright ban on the use of religious decision-making. This clause has been used to defend the same rights as the Religious Test Clause but can reach farther. *See Torcaso v. Watkins*, 367 U.S. 488, 489 n.1 (1961) ("Appellant also claimed that the State's test oath requirement violates the [Religious Test Clause]. Because we are reversing the judgment on [Free Exercise] grounds, we find it unnecessary to consider appellant's contention…"). Even if the more literal prohibition on religious tests does not prohibit federal action on this issue, a law of this nature is subject to "the most rigorous of scrutiny" because its object "is to infringe upon or restrict practices because of their religious motivation," making it not neutral. *Church of the Lukumi Babalu Aye. v. City of Hialeah*, 508 U.S. 520, 546, 533 (1993). Strict scrutiny, though theoretically survivable, is considered fatal in fact, and it is unclear that a regulation to this effect would do so, especially given the judiciary's historical rejection of regulation from other branches. *See, e.g.*, *City of Boerne v. Flores*, 521 U.S. 507, 513–514 (1997) (rejecting RFRA's attempt to restore the *Sherbert* test after it was eliminated by the court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990)).

C. Normative Desirability

Finally, even if feasibility and constitutionality are stipulated, banning all use of religious decision-making may not be normatively desirable. First, because this country has an underlying current of Christian hegemony, any rule to this effect is likely to disproportionately affect

minority judges. Christian values are considered the norm, and deviation from those "normal" values is more likely to be noticed and regulated than extreme applications of the background expectations. As discussed above in Section I.C, though religion is not legitimate grounds for demanding recusal, judges from minority religions are more often targeted by this form of argument. This pattern would likely persist in a system with a formal rule against religious decisions. The rulings that would be challenged are those that are viewed as illegitimate, and religious out-groups are more likely to lose legitimacy when making decisions that align with their religious views.[34] While preventing religious judges from imposing their views would seem to protect the rights of religious minorities, the broader backdrop of religious in- and out-groups in the United States may change that tool for equality into a weapon for injustice.

Second, if we accept that judges with religious convictions struggle to distinguish religious views from secular moral ones,[35] regulations to prevent religious decision-making could incentivize concealing religious influence and favor dishonest religious judges over truthful ones. This outcome creates the worst possible scenario. The process of recognizing, naming, and addressing a bias reduces its impact,[36] but if open recognition of this phenomenon is systemically discouraged, it leaves the underlying thoughts unchanged. A rule preventing religious consideration in cases may reduce judge's ability to intentionally consider the role their religion is playing in their thought processes.

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[34] Andre P. Audette & Christopher L. Weaver, *Faith in the Court: Religious Out-Groups and the Perceived Legitimacy of Judicial Decisions*, 49 Law & Soc'y Rev. 999, 1016–17 (2015) (finding faith in a court reduced when an atheist judge ordered removal of a nativity scene, but no change when a Christian judge allowed it).

[35] *See supra* Section II.A.

[36] Marilyn Cavicchia, *How to fight implicit bias? With conscious thought, diversity expert tells NABE*, Bar Leader, September-October 2015, https://www.americanbar.org/groups/bar_services/publications/bar_leader/2015-16/september-october/how-fight-implicit-bias-conscious-thought-diversity-expert-tells-nabe/.

Finally, directly targeting religious decision-making may offend some of the same values as the perception does.[37] It encourages people to question the good faith of the judges, dividing the judiciary into "good" judges who follow the rules (say, Justice Sotomayor) and "bad" ones who don't (Alito, for example) even if it's only based on speculation about the role of religion.[38] Creating litmus tests by which to compare judges may be more harmful and delegitimizing than the underlying issue.

III. Addressing the Perception

Because directly addressing religious decision-making (if it is a major factor in judicial practice) is practically or constitutionally difficult and may be normatively undesirable, other avenues for addressing this perception and its delegitimizing effect should be considered. However, prejudices are difficult to dislodge. A multipronged approach incorporating a combination of changes may be necessary to reduce the perception's prominence and counter its deleterious effects. Three possible ways to address the concern are (1) reforming the confirmation process to reduce the prominence of religion, (2) shifting the way decisions are written to create broader acceptance and increase judicial transparency, and (3) encouraging more liberal use of recusal/disqualification for religious bias.

A. Confirmation Process Reform

First, while in many areas speaking about a problem is necessary to countering it, the use of religious questioning in confirmation hearings implicitly endorses the view that judges' religious views are not only relevant to their service as a judge but an important part of whether

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[37] *See supra* Section I.C.

[38] *Cf.* Michael Rothbaum, *'Good Jew' or 'Bad Jew'? How U.S. Progressive Activists Police Jewish Participation*, Haaretz (Jul. 27, 2017), https://www.haaretz.com/opinion/2017-07-27/ty-article/good-jew-or-bad-jew-how-u-s-progressive-activists-police-jewish-participation/0000017f-f04b-d497-a1ff-f2cb75570000 (describing how support for Israel is seen as litmus test for acceptability of Jews in liberal spaces).

they are qualified,[39] worsening the problem. The confirmation process signals to the public what they should care about in their judges. While many of the questions are about judicial philosophy and decisions,[40] the hearings have become an "ideological food fight," as now-Justice Neil Gorsuch called them in 2002. [41] They ask questions about political issues and ask judges to rate how religious they are on a scale of one to ten.[42] Used to a standard job interview, where asking about religion is "problematic under federal law" and only allowed for a bona fide occupational qualification,[43] the public hearing questions about religion may take away a simple message: the judicial nominee's religion is relevant to their performance on the job. Eliminating these questions is a simple way to reduce the prominence of this delegitimizing belief.

B. Shifts in Style

Another possibility is to address the role of religion to dispel the fear around it, in the same way one would another form of motivated reasoning. In an article about addressing concerns around the Supreme Court's neutrality in constitutional cases, Dan Kahan suggests using social psychology techniques that reduce motivated reasoning to limit the perception of bias, as claims of neutrality often are seen as masking true motives.[44] One method he discusses, discussed in further depth by Howard Kislowicz, encourages judges to frame decisions in ways that make them more palatable to a broader subset of the population, a process known as

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[39] It may also be an unconstitutional religious test. *See* Smith, *The Dogma Lives Loudly*, *supra* note 12, at 323 (arguing that the religious questioning is a constructive Religious Test).
[40] Adam Liptak, *A Judge Is Hardly Asked About Judging*, N.Y. Times, Mar. 23, 2022, at A17. Available online at https://www.nytimes.com/2022/03/23/us/politics/ketanji-brown-jackson-confirmation-hearing.html
[41] Neil Gorsuch, *Justice White and judicial excellence*, UPI (May 4, 2002, 7:05 AM), https://www.upi.com/Top_News/2002/05/04/Justice-White-and-judicial-excellence/72651020510343/?u3L=1.
[42] Liptak, *supra* note 40.
[43] *Pre-Employment Inquiries and Religious Affiliation or Beliefs*, EEOC, https://www.eeoc.gov/pre-employment-inquiries-and-religious-affiliation-or-beliefs.
[44] Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 Harv. L. Rev. 1, 58 (2011)

overdetermination.[45] While Kislowicz warns of the risks of including explicitly religious reasonings in an overdetermined decision,[46] the general principle could offer a useful guide. By providing several ways to consider or frame the outcome, overdetermination makes it more likely that a larger portion of the population will feel heard by the decision and therefore be less inclined to seek out delegitimizing critiques. Moreover, having more than one secular justification reduces the appearance of torturing reason for religious ends.

More generally, an approach that favors transparency may also reduce concerns. Judicial decisions are mysterious things, and that hidden nature sows doubt.[47] Instead of creating a black box, acknowledgement and discussion of these concerns may reduce the fear of the religious judge. Judge John Noonan, in his rejection of the motion for him to recuse himself from an abortion case due to his Catholicism, provides a model. He acknowledges his membership in the Church, explains why, consistent with the Religious Test Clause, that is not grounds for forcing a recusal, and makes it clear that those views do not dictate his views, in this case by citing a case where he ruled in favor of an abortion advocate. *Codispoti*, 69 F.3d at 400–01. This candor can dispel concerns by recognizing them as legitimate and addressing them directly.

C. Recusal[48]

Finally, while forced recusal is constitutionally suspect and can be used discriminatorily,[49] increased use of voluntary recusal may reduce the perception and fear of religiously motivated judicial decisions. There are instances where judges cannot, consistently with their religious beliefs, neutrally judge a case. One potential avenue for addressing these

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[45] *Id.* at 67–71. Howard Kislowicz, *Judging Religion and Judges' Religions*, 33 J.L. & Religion 42, 51–54 (2018).
[46] Kislowicz, *supra* note 45, at 54.
[47] Kahan, *supra* note 44, at 58.
[48] Throughout, I will use recusal to mean recusal or disqualification for ease.
[49] *See supra* Section II.B, I.A, and I.C.

situtations is recusal.[50] This approach has a famous endorsement: In 1998, now-Justice Amy Coney Barrett (as Amy Coney) and her co-author suggested, that although forced recusal due to the appearance of partiality posed a constitutional issue, a judge who cannot decide impartially due to religious beliefs should recuse themselves.[51] In addition to the inherent merit of removing biased judges, this procedure also sends a message: judges who cannot be impartial do not impose their views, they instead recuse themselves. While it may not eliminate the belief, as judges choose when it applies, it would provide a touchstone for arguments of judicial neutrality and is a visible reminder of the shared goal: justice.

IV. Conclusion

The declining legitimacy and fears of a biased judiciary extend far beyond the realm of religious decision-making.[52] However, there is a definite perception of religious bias in judicial decisions which contributes to attacks on important values and the judiciary itself. While the perception does have some data to support it, there remains an empirical question around the extent to which religion affects judgment, making it hard to address at the source. This issue, as well as the practical realities of separating religious and moral concerns and the constitutional questions, make directly addressing religious decision-making unfeasible. Furthermore, the potential for discrimination in a direct approach makes it less desirable than it may seem initially. However, the perception is harmful and should be addressed on its own terms. First, the Senate should stop asking questions about religion during confirmation hearings. It plays into the belief and does not provide useful information, as the nominee's religious beliefs cannot be

[50] *See generally* Richard B. Saphire, *Religion and Recusal*, 81 Marq. L. Rev. 351 (1998).
[51] John H. Garvey and Amy v. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L.R. 303, 343–50, 331–39 (1998).
[52] *See, e.g.*, Kahan, *supra* note 44, at 58; Fallon, *supra* note 19, at 156.

disqualifying. Once the judges are on the bench, transparency, framing, and recusal can all help reduce the public's concern around judicial use of religion. While the perception may persist, limiting its hold on the public will serve the good of the judiciary and the United States as a whole.

Applicant Details

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Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2017**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Andrea Roos
2725-B Duke Homestead Road
Durham, NC 27705

June 12, 2023

The Honorable Timothy J. Kelly
United States District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, DC 20001

Dear Judge Kelly:

I am writing to express my strong interest in clerking for you for the 2025-2026 term. I am a rising third-year law student at Duke Law School and expect to graduate in May of 2024. As I attended Georgetown University and worked in Washington, DC both after I graduated from Georgetown and for each summer during law school, I have strong ties to the area and plan to live and practice in the city upon graduation from Duke Law.

Prior to attending law school, I worked at Cornerstone Research in economic and financial litigation consulting. In this role, I completed quantitative and qualitative analyses and drafted expert reports for a variety of matters, including securities litigation, antitrust, and government investigations. Over four years, I transitioned my work from conducting data and document analyses to synthesizing key analysis takeaways, developing methodology, managing analyst teams, and drafting portions of expert reports and white papers. I learned to multitask without compromising the quality of my work and developed strategies for working with a variety of personalities. I believe these experiences have prepared me to excel as your clerk.

While at Duke Law, I have enhanced my research and writing skills by working as a Staff Editor and the Special Projects Editor on *Duke Law Journal*, authoring a Note that will be published in the November 2023 issue of *Duke Law Journal*, and spending my summers at Weil, Gotshal, and Manges LLP and Sullivan & Cromwell LLP. I have also developed my advocacy and leadership skills by serving as the TROSA Clinic Coordinator for the Fair Chance Project.

Enclosed is my resume, Duke Law and undergraduate transcripts, writing sample, and three letters of recommendation from Professors Veronica Root Martinez, Sofia Hernandez, and Sara Greene. Please contact me if you need any additional information. Thank you for considering my application.

Sincerely,

Andrea Roos

ANDREA LINK ROOS
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EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: 3.86
Honors: Top 5% of the Class of 2024
Duke Law Journal, *Special Projects Editor* **(**Vol. 73); *Staff Editor* (Vol. 72)
Dean's Award: Contracts, Spring 2022; Dean's Scholarship recipient
Publication: *Hawks and Doves: Evaluating Presidential Powers and Duties Against Congress's Power to Declare War*, 73 Duke L.J. (forthcoming)
Pro Bono: Fair Chance Project (expunction clinics), *2022–23 TROSA Clinic Coordinator*

Georgetown University, Edmund A. Walsh School of Foreign Service, Washington, DC
Bachelor of Science in Foreign Service in International Political Economy, May 2017
GPA: 3.77
Honors: Peter F. Krogh Millennial Scholar; Improving the Human Condition Grant Recipient
Thesis: *Anti-Corruption Commissions: Evaluating the Impact of Anti-Corruption Reform on Expert and Citizen Perceptions of Corruption in Cameroon, Kenya, and Nigeria*
Study Abroad: University of Oxford Pembroke College, Philosophy, Politics, and Economics, Oxford, UK October 2015 – June 2016
Activities: O'Brien Research Fellow, Student Research Assistant, *The Hoya* Editorial Board

EXPERIENCE

Sullivan & Cromwell LLP, Washington, DC
Summer Associate (Summer 2023)

Weil, Gotshal & Manges LLP, Washington, DC
Summer Associate – Antitrust (Summer 2023)

Weil, Gotshal & Manges LLP, Washington, DC
Summer Associate - Antitrust (May 2022 – July 2022)

- Researched and drafted memoranda summarizing the competitive landscapes of various industries to determine the competitive overlap between our clients and potential bidders.
- Prepared presentations for the DOJ and the FTC for use in the HSR merger clearance process.
- Drafted responsive narratives for a second request from the FTC.
- Conducted document review searches in Relativity to identify and analyze key internal documents.

Cornerstone Research, Washington, DC and New York, NY
Research Associate (August 2020 – July 2021); *Senior Analyst* (August 2019 – August 2020)
Analyst (August 2017 – August 2019); *Summer Analyst* (June 2016 – August 2016)

- Provided financial and economic analysis for commercial litigation matters.
- Supported academic and industry experts in preparing for deposition and trial testimony.
- Drafted expert report sections for use in litigation on topics including antitrust, shareholder class action damages, and market efficiency.
- Managed three-to-ten-person analyst teams to conduct statistical research on data points including 400 million customer bank accounts, intra-day company stock prices, and U.S. cellular data plans.
- Analyzed analyst reports, depositions, and industry reports for use in expert reports for litigation.
- Led the Analyst Group as Analyst Group Coordinator.
- Selected as one of eight analysts to lead the Analyst Recruiting Process for the NY Office.

ADDITIONAL INFORMATION

Proficient in Spanish. Working knowledge of SAS, SQL, STATA, R, Relativity, Factiva, Bloomberg, Westlaw, LexisNexis, Casetext. Interests include hiking, Vermont skiing, and listening to daily news podcasts.

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UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Jones, T.	4.0	4.50
Torts	Guttel, E.	3.9	4.50
Criminal Law	Coleman, J.	3.3	4.50
Legal Analysis, Research, Writing	Hernandez, S.	*Credit Only*	0.00

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Contracts	Greene, S.	4.1	4.50
International Law	Helfer, L.	4.1	3.00
Legal Analysis, Research, Writing	Hernandez, S.	4.0	4.00
Constitutional Law	Powell, J.	3.6	4.50

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Ethics and Professional Responsibility	Martinez, V.	4.0	3.00
Business Associations	Raskin, S.	4.0	4.00
National Security Law	Dunlap, C.	3.9	3.00
Property	Foster, A.	3.8	4.00

2022 WINTER TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Litigation Management	Percy, B.	*Credit Only*	0.50
Litigation Strategy in the Corporate Context	Hart, C.	*Credit Only*	0.50

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2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Securities Litigation, Enforcement, and Compliance	Martinez, V.	3.9	3.00
Evidence	Stansbury, S.	3.9	3.00
Administrative Law	Benjamin, S.	3.8	3.00
Antitrust	Richman, B.	3.7	4.00
Antitrust Course Plus	Richman, B.	*Credit Only*	0.50
Race and the Law Speakers Series	Jones, T.	*Credit Only*	1.00

TOTAL CREDITS: 59
CUMULATIVE GPA: 3.86

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Andrea Roos

Dear Judge Kelly:

I am writing this letter on behalf of Andrea Roos, a phenomenal student and legal thinker. I give Andrea my highest recommendation for a clerkship in your chambers. Andrea is one of the best students I have taught at Duke Law School, and *the* best in the past five years.

Andrea was in my first-year contracts class in the spring of 2022. It was clear early on that Andrea had a sharp legal mind. In the first few weeks of class, most first-year students are still struggling to figure out the issue in each case. Andrea, however, was already asking (and answering) interesting, complicated questions that go well beyond first year material. When I asked challenging open-ended questions, I could always count on Andrea to volunteer, and to be spot-on. I use the Socratic method in my first-year class, and Andrea was always well-prepared and right on point.

I de-identify my exams when grading them, but I was not surprised to see, once the exams were linked to student names, that Andrea was the top performer in the class. She was the best student day-to-day, and that translated into the best exam (which does not always happen). While I have not had Andrea in a course that emphasizes writing, I can say her exam was incredibly well-written. Further, it does not surprise me to see that the seminar paper she wrote in National Security Law was selected to be a student note in the *Duke Law Journal* (to be published in 2023).

Every once in a while, I have a student in contracts who I know will be a star. Andrea is one of those students. And to go along with her intellectual and scholarly skills, she is a joy to talk with. As a former clerk myself, I can tell you Andrea would be a delight to work with in chambers.

If you have any questions or need any further information, please feel free to contact me.

Sincerely yours,

Sara Sternberg Greene
Professor of Law

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June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Andrea Roos

Dear Judge Kelly:

I write to enthusiastically recommend Andrea Roos to serve as a law clerk in your chambers. Andrea is by far one of the most impressive students I have had the privilege to teach, and I am certain that she will excel as a law clerk.

Andrea has taken two courses from me during law school—(i) Ethics and Professional Responsibility and (ii) Securities Litigation, Enforcement and Compliance. Andrea was a standout student in both courses due to her intelligence, diligence, and creative mind.

Andrea is one of the brightest students I have had the privilege to teach during my decade of law teaching. She reads concepts, understands them, has a high degree of analytical ability, and a clear and concise communication style. Her academic excellence while in law school is extremely consistent, which is unsurprising given the intellectual rigor she applies when completing her academic work. Andrea will have no difficulty diving in to assist with the most complex of cases, and her written work product is absolutely excellent. Intelligence, however, is often not enough to convince me that someone will be an excellent law clerk. There are lots of bright students who are not diligent and reliable enough to warrant a recommendation for such an important role. Andrea, however, is not only extremely smart, she is also extraordinarily diligent. She is able (and willing) to pay careful attention to both big and small details and to understand how those different pieces of information will interact with each other. Both of the courses she took from me have readings that are both tedious and dense. Andrea understood the material, identified inconsistencies within it, articulated arguments on the basis of that material, and was able to take abstract concepts and apply them to more practical situations. She is going to be an incredible lawyer one day, and I am confident she is prepared to be a fantastic law clerk today.

Finally, Andrea has an unusually creative mind. When she is presented with a problem, she is able to come up with an innovative solution to that problem. One challenge law students and young lawyers often have to overcome is an ability to feel comfortable providing robust legal analysis and advice. Most students are comfortable researching a legal problem and presenting the pros and cons of a situation based on that research, but they are often hesitant to take the next step of suggesting or arguing a way forward. Andrea has, however, already found comfort and confidence in her ability to assess situations and make creative and sensible recommendations based on the problem presented and her understanding of the relevant research. Indeed, Andrea, as a second-year law student, is able to make novel suggestions rooted in legal authority, and she is able to connect material in class to her experiences working in both the legal and financial sectors.

On a more personal note, I spoke with Andrea at length when she was considering whether to clerk. She approached this decision in her classic deliberative and conscientious manner, and she weighed all pros and cons for taking on a clerkship. I am of the belief that the best law clerks are those who truly want to clerk and who want to learn in the unique setting that a clerkship presents for young lawyers. Andrea is one of those students. I believe she will contribute meaningfully to Chambers, while also gaining a great deal of insight on what is necessary to achieve excellence as a member of the legal profession. In short, Andrea is one of the most outstanding law students I have had the privilege to teach in the decade I have been teaching law. I am confident she will be an outstanding law clerk who will not only be able to complete her assignments, but who will also contribute to the intellectual life of the chambers and courthouse.

I could not more enthusiastically recommend her to serve as a law clerk in your chambers. Please do not hesitate to contact me with any questions you may have.

Sincerely yours,

Veronica Root Martinez
Professor of Law

Veronica Root Martinez - martinez@law.duke.edu - 919-613-8540

CITY ATTORNEY
CITY OF DURHAM

Sofia Hernandez
Senior Assistant City Attorney
City Attorney's Office
City of Durham
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Sofia.Hernandez@durhamnc.gov

Your Honor:

I write to recommend Andrea Roos for a clerkship in your chambers. Andrea is a very intelligent and hard-working law student. She is going to be a strong addition to the legal field, whether she practices law, serves in the judiciary, or pursues academia. I would certainly hire her for any of those roles.

In addition to my duties with the City of Durham's Attorney's Office, I have had the honor to serve as a legal writing professor at Duke Law School. I met Andrea when she was my student in Legal Analysis, Research and Writing. LARW is Duke's required, year-long introduction to fundamental lawyering skills. During the year, I work closely with all my students as they complete research and writing assignments of increasing complexity. So, I tend to develop a good appreciation for the quality of both their work and their work habits. With Andrea, I particularly enjoyed our several 1:1 legal writing conferences. It gave me insight into her organization and critical thinking.

Andrea was always a pleasure to have in class. She was always prepared. Andrea did not shy away from in-class discussion. I could always count on her to provide concise and clear analysis on caselaw. She asked insightful questions that helped guide our class dialogue and clarified issues for the entire class. She received a 4.0 in my class not only because she has strong writing and research skills, but because she was a regular in office hours and challenged herself by pursuing challenging legal questions.

Andrea got along well with her classmates. She had to work in pairs or on teams for a variety of projects inside and outside the classroom. My sense is that she'll work well with anyone. She was often looked to as a leader in class discussions and assignments. I imagine due in part to her patient and kind demeanor.

Please let me know if there is anything else that I can tell you about Andrea. I'd be happy to share more.

Sincerely Yours,

/s/ Sofia Hernandez

Sofia Hernandez
Senior Assistant City Attorney
City Attorney's Office

ANDREA LINK ROOS
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Writing Sample

This is an appellate brief written for my Legal Analysis, Research, and Writing course. In this brief, we were asked to address whether attorney's fees are included in "costs" as defined by Federal Rule of Civil Procedure 41(d).

My client, the defendant-appellee in this matter, owns and operates a ski area in Montana. When my client purchased the land for his ski operation from his brother, the plaintiff-appellant, his brother reserved an easement through the land. The plaintiff-appellant sued in district court to gain access to the easement and obtain monetary damages. In district court, the plaintiff-appellant hired and subsequently fired a damages expert that presented a fraudulent CV and fabricated academic credentials. The plaintiff-appellant then withdrew the case and refiled in a different district court. In response, my client motioned for attorney's fees, as he spent $42,435 in attorney's fees deposing the fraudulent damages expert. The district court ruled that my client was entitled to the payment of $42,435 in attorney's fees under Federal Rule of Civil Procedure 41(d). The plaintiff-appellant appealed the district court's ruling.

For this appellate brief, we were instructed to primarily use in-text citations. "JA" refers to a joint-appendix of background documents we received to write the brief.

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STATEMENT OF THE ISSUE

Under Federal Rule of Civil Procedure 41(d), the court may order a plaintiff who refiles a previously dismissed action to pay all or part of the costs of that previous action. Carl Sparks Enterprises, Inc. spent $42,885, of which 99% were attorney's fees, to defend Tray Sparks' initial claim. Did the District Court have the discretion to make Carl Sparks Enterprises, Inc. whole by ordering Tray Sparks to pay its attorney's fees from his first voluntarily dismissed suit?

STATEMENT OF THE CASE

Plaintiff-Appellant Tray Sparks ("Tray") owns and runs cattle on hundreds of acres of land in Montana. JA2–3. Tray sold portions of his land to his brother, Carl Sparks ("Carl"), that was unsuitable for livestock. JA3. Through Defendant-Appellee Carl Sparks Enterprises, Inc. ("CSE"), Carl developed the land he purchased into additional terrain for his Pine Ridge Ski Area. JA3–4. When Carl purchased the land, Tray reserved an easement through the land that allowed him access to US 93. JA4.

From 1985 to 2021, Tray's cattle operations and Carl's ski area coexisted. *See* JA4. Tray ran his cattle on the land in the summer and moved the cattle in the winter. JA4. This coexistence, however, changed in 2021 when Tray began exploring how to develop the land into a resort community. *See* JA4. Tray observed that his access to the road was blocked in the winter because of CSE's ski area. JA4. On February 14, 2021, Tray demanded that Carl cease blocking the road. JA7–8. The following day, Carl declined to comply with Tray's demand, as complying would disrupt ski operations that had been in place for twenty years. JA7–8.

On June 4, 2021, Tray filed an action in U.S. District Court for the District of Montana, Helena Division against CSE that alleged nuisance and fraud and sought monetary and injunctive relief. JA16–21. On the same day, Tray also filed a Motion for Preliminary Injunction. JA21.

Ten days later, CSE filed both a Motion in Opposition to the Preliminary Injunction and Motion to Dismiss. JA21. A temporary injunction hearing was scheduled for July 26, 2021, where the Helena District Court judge "entered a Pretrial Order requiring the parties to submit proposed exhibits, stipulations, witnesses, and deposition excerpts by July 12." JA29. CSE deposed and subsequently moved to strike Tray's damages "expert" on July 5, 2021, on the grounds of a fraudulent CV that contained a fabricated CPA degree from the University of Montana. JA13–14, 21. On July 23, Tray filed an Emergency Motion for Relief from the court's Pretrial Order; that same day, the court denied the Motion at 2:45 pm. JA15, 21. Tray then filed to dismiss without prejudice at 2:48 pm. JA15. Nine minutes later, CSE attempted to file an answer. JA15.

On August 6, 2021, Tray refiled the action, alleging only nuisance, against CSE in U.S. District Court for the District of Montana, Butte Division ("Butte District Court"). JA1–6. The refiled action was based on the same claim against the same defendant as the earlier action. JA30. In response, CSE motioned for attorney's fees and for stay on August 10, 2021. JA1. After Tray submitted a Memorandum in Opposition of CSE's Motion on August 24, 2021, the Butte District Court granted CSE's Motion for Attorney's Fees and For Stay on September 15, 2021. JA1. The Butte District Court found that CSE was entitled to $42,435 in attorney's fees: $12,790 from moving to dismiss the fraud claim, which was abandoned for the refiled lawsuit, and $29,645 from deposing and moving to strike Tray's fraudulent damages "expert." JA28, 32. Thus, the court determined that Rule 41(d) costs do include attorney's fees and that Tray must pay CSE's $42,435 in attorney's fees from the first lawsuit within 30 days. JA32.

On October 18, 2021, CSE notified the court that Tray had not paid its costs. JA33. Because Tray disobeyed the court's order, the Butte District Court dismissed Tray's claim with

prejudice on November 1. JA33. Tray appealed the Butte District Court's final judgment and dismissal with prejudice on December 1, 2021. JA34.

STANDARD OF REVIEW

The Ninth Circuit reviews a district court's decision to award or deny attorney's fees for abuse of discretion. *P.N. v. Seattle Sch. Dist. No. 1*, 474 F.3d 1165, 1168 (9th Cir. 2007). The Ninth Circuit reviews any legal analysis or statutory interpretation relevant to the attorney's fees decision de novo. *Id.* Factual findings that guide the district court's decision are reviewed for clear error. *Id.*

ARGUMENT

I. THE PLAIN MEANING OF "COSTS," OTHER FEDERAL RULES, AND INTENT OF RULE 41 DEMONSTRATE THAT 41(D) COSTS INCLUDE ATTORNEY'S FEES.

The Butte District Court did not abuse its discretion by ordering Tray to pay CSE's attorney's fees because the plain meaning of "costs," the term's usage in other Federal Rules, and the intent of Rule 41(d) support the inclusion of attorney's fees as costs. Thus, CSE respectfully requests this Court affirm the Butte District Court's judgment.

The Ninth Circuit utilizes "traditional tools of statutory construction" to interpret the Federal Rules of Civil Procedure. *Republic of Ecuador v. Mackay,* 742 F.3d 860, 864 (9th Cir. 2014) (citation omitted). Under Rule 41(d), the court "*may* order the plaintiff to pay *all* or *part* of the *costs*" of a previously dismissed action when the plaintiff refiles an action based on the same claim against the same defendant in a different court. Fed. R. Civ. P. Rule 41(d) (emphasis added). Under Rule 41(d), the court has complete discretion to award costs for suits that were voluntarily dismissed and refiled.

The American Rule, where each party is required to bear its own attorney's fees, is subject to certain exceptions that recognize the "inherent power in the courts to allow attorneys' fees in particular situations." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975). Exceptions to the American Rule are found "when the interests of justice so require." *Hall v. Cole*, 412 U.S. 1, 5 (1973). Such exceptions include when a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons," or when a party's "*unreasonable* conduct has violated the rules of litigation." *Marek v. Chesny*, 473 U.S. 1, 36–37 (1985) (citation omitted). Thus, the American Rule is not absolute, and the court has discretion to award attorney's fees.

Whether attorney's fees are included in Rule 41(d) costs is a question of first impression for the Ninth Circuit. Many of our sister circuits have addressed this issue and though split, most held that Rule 41(d) costs can include attorney's fees.[1] Notably, seven of the eight circuits that have analyzed this question determined that Rule 41(d) costs can include attorney's fees, with the Second, Eighth, and Tenth Circuits holding that Rule 41(d) costs always include attorney's fees, regardless of the underlying statute.[2]

Here, the word "costs" has a plain meaning that allows attorney's fees to be included in its definition. Further, an analysis of other Federal Rules supports the plain meaning of "costs" that includes attorney's fees. Finally, Congress's intent for the rule to deter forum shopping and

[1] *See Horowitz v. 148 S. Emerson Assocs. LLC*, 888 F.3d 13, 24 (2d Cir. 2018); *Evans v. Safeway Stores Inc.*, 623 F.2d 121, 122 (8th Cir. 1980); *Meredith v. Stovall*, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000); *Garza v. Citigroup Inc.*, 881 F.3d 277, 279 (3d Cir. 2018); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 311 (4th Cir. 2016); *Portillo v. Cunningham*, 872 F.3d 728, 739 (5th Cir. 2017); *Esposito v. Piatrowski*, 223 F.3d 497, 501 (7th Cir. 2000). *But see Rogers v. Wal-Mart Stores*, *Inc.*, 230 F.3d 868, 875 (6th Cir. 2000).

[2] The Second, Eighth, and Tenth Circuits determined that costs always include attorney's fees under FRCP 41(d). *See Horowitz*, 888 F.3d at 24; *Evans*, 623 F.2d at 122; *Meredith v. Stovall*, No. 99-3350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000). The Third, Fourth, Fifth, and Seventh Circuits held that attorney's fees can be awarded if the underlying statute defines "costs" to include attorney's fees. *See Garza*, 881 F.3d at 279; *Andrews*, 827 F.3d at 311; *Portillo*, 872 F.3d at 739; *Esposito*, 223 F.3d at 501.

vexatious litigation can only be achieved by including attorney's fees in costs. Thus, CSE respectfully requests the Court affirm the Butte District Court's judgment.

A. Considering the plain meaning of "costs" and other language in Rule 41, attorney's fees are included in Rule 41(d) costs.

When construing a Federal Rule of Civil Procedure, the plain text meaning of the rule must be determined first with an "eye toward the 'purpose and context of the statute.'" *Mackay,* 742 F.3d at 864 (citation omitted). When no statutory definition exists, a word, like costs in Rule 41(d), should be accorded its ordinary meaning. *See Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 874 (9th Cir. 2007). To determine a word's ordinary meaning, the Ninth Circuit looks to dictionary definitions. *See United States v. Maciel-Alcala*, 612 F.3d 1092, 1096 (9th Cir. 2010). A term is also given a more precise meaning by examining the language around it. *See Probert v. Fam. Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1011 (9th Cir. 2011).

1. The ordinary meanings of "costs" support a plain meaning that includes attorney's fees.

The ordinary meaning of "costs" unambiguously includes attorney's fees. *See Cost*, *Webster's Third New International Dictionary* 515 (Philip Babcock Gove ed., 2002). Costs are defined as "expenses incurred in litigation: as a: those *payable to the attorney or counsel*." *Id.* (emphasis added). As defined, costs do encompass attorney's fees. *Id.*

2. Congress's usage of "may" and this Court's interpretation of Rule 41(a) support that attorney's fees are included in costs.

The adjacent language in Rule 41(d) supports a plain meaning of "costs" that includes attorney's fees. A term is given a more precise meaning by examining the words around it. *See Probert*, 651 F.3d at 1011. By using the term "may" in Rule 41(d), Congress indicated a willingness to allow the court wide discretion in implementing Rule 41(d). *See Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) (defining "may" as "a permissive word, and [the court]

will construe it to vest discretionary power absent a clear indication from the context that Congress used the word in a mandatory sense."). Because "may" is a term used around "costs," the breadth of discretion implied by "may" demonstrates that the court should interpret costs with that same discretion. *See id*; *see also Probert*, 651 F.3d at 1011. Here, the Butte District Court did exactly that – it exercised the very discretion Congress gave to it under Rule 41(d) by awarding attorney's fees as costs. *See* JA32.

Further, the plain meaning of costs in Rule 41(d) is supported by this Court's interpretation of Rule 41(a)(2). *See Koch v. Hankins*, 8 F.3d 650, 652 (9th Cir. 1993). Because "an interpretation that gives effect to every clause is generally preferable to one that does not," an analysis of Rule 41(d) should be aligned with the interpretation of the remainder of the rule, including Rule 41(a)(2). *Mackay*, 742 F.3d at 864. When a plaintiff dismisses a case pursuant to Rule 41(a)(2), this Court has held that a defendant is entitled to recover costs, including attorney's fees, for work that is not helpful for continuing litigation between the parties. *See Koch*, 8 F.3d at 652. Just as Rule 41(d), Rule 41(a)(2) does not contain the term "costs." This Court has interpreted the clause to include attorney's fees as recoverable. *See id*. As a defendant can incur significant expenses under both Rule 41(a)(1) and Rule 41(a)(2) dismissals, there is no reason to allow different recoverable costs in each clause. *See Esquivel v. Arau*, 913 F. Supp. 1382, 1391 (C.D. Cal. 1996). Thus, even though the dismissal here was pursuant to Rule 41(a)(1), it would be inconsistent for this court to interpret Rule 41(d) costs in a manner that fails to give effect to the totality of Rule 41 by applying different standards to portions of the same rule. *See id.*

Here, the impact of an inconsistent application of costs within Rule 41 is particularly apparent. Had CSE filed its Answer nine minutes earlier, Tray Sparks' action would be

governed under Rule 41(a)(2) and the $42,435 in attorney's fees would have been automatically recoverable. *See* JA15, 32; *see also Koch*, 8 F.3d at 652. Allowing attorney's fees to be recovered in Rule 41(d) costs not only gives effect to every clause of Rule 41 but averts the injustice of nine minutes determining whether CSE recovers $42,435.

B. Congress's usage of "costs" and "attorney's fees" in other Federal Rules demonstrates that it did not intend to exclude attorney's fees from Rule 41(d) costs.

When Congress "includes particular language in one section of a [Rule] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) (citation omitted). *But cf. Key Tronic Corp. v. United States*, 511 U.S. 809, 815 (1994) (indicating that if a Federal Rule demonstrates an intent to include attorney's fees, the absence of a concrete reference to attorney's fees is not determinative). In Rule 54(d), Congress outlines the procedures surrounding "costs" and "attorney's fees" separately. Rule 54(d)(1) outlines the procedure for allowing "Costs Other Than Attorney's Fees" to be paid to the prevailing party, while Rule 54(d)(2) denotes the procedure for "Attorney's Fees." When Congress intends to exclude attorney's fees from costs, here for procedural reasons, it does so clearly. *See* Rule 54(d). Congress made no such choice with Rule 41(d).

Further, the Federal Rules of Civil Procedure only contain express inclusions of attorney's fees when Congress intended to supplement the term "expenses." *See e.g.*, Rule 37(5)(a) ("to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees."). Other than Rule 54(d), no Federal Rule of Civil Procedure contains the term "costs" with modifying language related to attorney's fees. *See generally* Fed. R. Civ. P. Thus,

while Congress intended for "expenses" to exclude attorney's fees in its unmodified usage, it did not intend the same for the unmodified usage of costs. *See e.g.*, Rule 30(g) ("may recover reasonable expenses for attending, including attorney's fees . . ."); *see also* Rule 16(f) ("to pay the reasonable expenses – including attorney's fees . . .").

The Ninth Circuit also looks to the Advisory Committee notes "when interpreting a federal rule for 'guidance and insight.'" *United States v. Saeteurn*, 504 F.3d 1175, 1180 n.11 (9th Cir. 2007) (citation omitted). Further, the meaning of words in the Federal Rules of Civil Procedure can be informed by the interpretation of the same language in the Federal Rules of Appellate Procedure. *See Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1369 (9th Cir. 1985) (noting the interpretation of identical language in the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure is relevant when interpreting the common term). In contrast to the Advisory Committee Notes of Federal Rule of Appellate Procedure 39, Rule 41's Advisory Committee Notes do not include any explicit expression of authorized costs. *See generally* Fed. R. App. P. 39 advisory committee's note to the 1967 adoption; s*ee also* Rule 41 advisory committee's notes. As Congress acts intentionally and the Advisory Committee notes for Rule 41 express no specific enumeration of costs, attorney's fees under Rule 41(d) costs were not barred by Congress. *See* Rule 41 advisory committee's notes.

C. Rule 41(d)'s intent to deter vexatious litigation and forum shopping supports a plain meaning of costs that includes attorney's fees.

The purpose of Rule 41(d), to deter vexatious litigation and forum shopping, supports a plain meaning of "costs" that includes attorney's fees. *See Rogers*, 230 F.3d at 874 (noting that "Rule 41(d) is meant not only to prevent vexatious litigation, but also to prevent forum shopping . . ."). When interpreting federal rules, the court should interpret the rules "harmoniously with their dominant legislative purpose." *Spilker v. Shayne Lab'ys, Inc.*, 520 F.2d 523, 525 (1975).

1. Rule 41(d)'s objective can only be achieved by including attorney's fees in costs.

Rule 41(d) would be ineffective if attorney's fees were not included in costs, as attorney's fees are frequently substantial and impossible to avoid. *See Horowitz*, 888 F.3d at 26; *see also Esquivel*, 913 F. Supp. at 1391 (writing it is illogical to award "costs *exclusive* of attorneys' fees, since the typical defendant cannot adequately defend a case without incurring such fees."). Here, solely allowing CSE to recover $450 of 28 U.S.C. §1920 (2018) taxable costs would not fulfill the objective of Rule 41(d), as $450 represents only 1% of the total costs incurred by CSE. JA30–32. Allowing the recovery of 100% of costs, as the Butte District Court ordered, deters vexatious litigation and forum shopping far more effectively than 1% of costs. *See Horowitz*, 888 F.3d at 26 (holding that the Second Circuit is "wholly unconvinced such small payments would effectively deter litigants.").

2. Allowing attorney's fees under 41(d) costs is not inconsistent with the U.S. Supreme Court's analysis of Rule 68 costs.

Holding Rule 41(d) costs to include attorney's fees would not be inconsistent with the U.S. Supreme Court's analysis of Rule 68 costs, because Rule 68's intent to "encourage settlement and avoid litigation," *Marek*, 473 U.S. at 5, is distinguishable from Rule 41's intent. Because Rule 68's purpose is neutral, *id*. at 10, and because "parties' incentives to settle are tied to the amount of available recovery [under the substantive statute]," it is consistent for the underlying statute to define recoverable costs under Rule 68. *See Horowitz*, 888 F.3d at 25 n.6. In contrast, Rule 41(d) both favors defendants and applies before the court even assesses a claim's merits or connection to the underlying substantive statute. *See id.* Consequently, the purpose of Rule 41(d) is distinguishable from Rule 68. Thus, holding that attorney's fees are

included in Rule 41(d) costs is not inconsistent with the U.S. Supreme Court's holding in *Marek*. 473 U.S. at 9–10.

* * *

Here, the Butte District Court determined attorney's fees are recoverable under Rule 41(d) costs. JA32. The Butte District Court ordered Tray to pay CSE's costsJA32. Instead, Tray disobeyed the Butte District Court's directive and only paid $450, representing 1% of what the Butte District Court ordered. JA33. As CSE's attorney's fees are recoverable under Rule 41(d) costs, Tray must pay the remaining $42,435 of CSE's accrued costs.

CONCLUSION

For the foregoing reasons, the judgment of the Butte District Court should be affirmed.

Date: March 21, 2022

Applicant Details

First Name	**Jonathan**
Last Name	**Wiersema**
Citizenship Status	**U. S. Citizen**
Email Address	**wiersema@pennlaw.upenn.edu**
Address	**Address** Street **3411 Chestnut St.** City **Philadelphia** State/Territory **Pennsylvania** Zip **19104** Country **United States**
Contact Phone Number	**3173843237**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2021**
JD/LLB From	**University of Pennsylvania Carey Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 20, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Jessup International Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Burke-White, William
wburkewh@law.upenn.edu
215-898-7674
Wiener, Matthew
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jonathan Wiersema (317) 384-3237 wiersema@pennlaw.upenn.edu

June 12, 2023

The Honorable Timothy J. Kelly
U.S. District Court for the District of Columbia
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave. NW
Washington, DC 20001

Dear Judge Kelly:

I am a rising third-year law student at the University of Pennsylvania Law School writing to submit my application for a clerkship in your chambers for the 2025-26 term.

Throughout law school, I have pursued opportunities outside the classroom to develop my research and writing skills that would make me an effective law clerk. Last summer, interning at the International Partnership for Human Rights in Tbilisi, Georgia, I assessed evidence of war crimes committed in Ukraine under the Rome Statute and helped draft a sanctions request to the U.S. government under the Global Magnitsky Act. Further, as a research assistant for Professor Matthew L. Wiener, I catalogued all post-New Deal judicial decisions addressing the authority of administrative agencies to adjudicate and prepared an article for a forthcoming online publication.

My experiences have instilled in me an appreciation for and commitment to public service. After graduation, I intend to pursue a government career in national security or foreign affairs and would greatly welcome the opportunity to work on cases within the District Court's unique docket involving such matters.

Please see the enclosed files for my resume, law school transcript, undergraduate transcript, and writing sample. Letters of recommendation from Professor William Burke-White (wburkewh@law.upenn.edu; 617-901-0391), Professor Jill Fisch (jfisch@law.upenn.edu; 215-746-3454), and Professor Matthew L. Wiener (matthew.l.wiener@gmail.com; 202-480-2104) are also included.

Thank you for your time and consideration of my application.

Sincerely,

Jonathan Wiersema

Encls.

Jonathan Wiersema

(317) 384-3237 wiersema@pennlaw.upenn.edu

EDUCATION

University of Pennsylvania Law School, Philadelphia, PA
J.D. Candidate, May 2024

Honors: *University of Pennsylvania Law Review*, Symposium Editor
Legal Horizons Rule of Law Fellow
Honors in Legal Practice Skills

Activities: Jessup International Moot Court, Top-5 Oralist and Semi-Finalist National Rounds
Penn Energy Law Club, Co-Founder
Federalist Society, Member

Georgetown University, Edmund A. Walsh School of Foreign Service, Washington, DC
B.S., *summa cum laude*, Foreign Service, May 2021

Honors: Phi Beta Kappa, Krogh Scholar, Dobro Slovo Honors Society, Slavic Departmental Award

Thesis: "Rosatom's Nuclear Expansion: A Reevaluation of Business and Threat Prospects"

Activities: *The Hoya*, Deputy Opinion Editor
Georgetown Moot Court Team, President and Founder
Teaching Assistant, Department of Economics

Publication: *Protest in Peril? Russia's Constitutional Court Upholds Article 212.1*, Kennan Cable, no. 66 (April 8, 2021)

EXPERIENCE

United States Department of State, Washington, DC July 2023 [Expected]
Incoming Intern, Office of the Legal Adviser (L)
Assignments in Office of Law Enforcement and Intelligence (L/LEI) and Office of Diplomatic Law and Litigation (L/DL).

Paul Hastings, LLP, Washington, DC May 2023-Present
Summer Associate
Work on variety of matters from investigations, trade controls, and complex litigation practice groups, including completing diligence reviews and researching applicable judicial precedents.

Georgetown University Law Center, Washington, DC Feb. 2023-Present
Research Assistant for Professor Mary DeRosa
Research national security law case studies on genocide determinations and assist with drafting chapter for forthcoming book.

University of Pennsylvania Law School, Philadelphia, PA Jan. 2023-Present
Research Assistant for Professor Matthew L. Wiener
Analyze and write on cases and academic articles relating to the constitutional limits of agency adjudication, current controversies in administrative adjudication before courts, and related subjects.

United States District Court for the District of Columbia (D.D.C.), Washington, DC Jan. 2023-May 2023
Judicial Intern, Chambers of Judge Randolph D. Moss
Assisted with research and drafting of court opinions and wrote legal memos analyzing issues of criminal law, the Freedom of Information Act, and the Anti-Terrorism Act.

Jonathan Wiersema (317) 384-3237 wiersema@pennlaw.upenn.edu

EXPERIENCE (CONT.)

International Partnership for Human Rights, Tbilisi, Georgia May 2022-July 2022
Legal Intern
Wrote sanction requests and reports on Russian war crimes in Ukraine. Conducted refugee interviews in Russian for universal jurisdiction cases. Investigated open-source intelligence for evidence of war crimes.

Middlebury Institute of International Studies, Monterey, CA May 2021-Aug. 2021
Fellow, Monterey Summer Symposium on Russia
Participated in diplomatic writing workshop and Harvard Negotiation Task Force boot camp on arms control. Listened to array of lectures on Russian foreign policy, history, and domestic politics from leading experts.

United States Department of State, Washington, DC Sept. 2020-Apr. 2021
Virtual Intern, Bureau of Intelligence and Research (INR)
Analyzed open-source English & Russian language intelligence relating to Russia's civilian nuclear energy program and wrote comprehensive report for Bureau use.

Department of Government, Georgetown University, Washington, DC Jan. 2020-Aug. 2020
Research Assistant for Professor Michael A. Bailey
Coded audience reactions to former President Trump's speeches, analyzing applause patterns. Assessed political direction of agency deference in 300+ Supreme Court administrative law cases.

United States Department of State, Washington, DC Oct. 2019-Mar. 2020
Intern, Bureau of International Security and Non-Proliferation (ISN)
Coordinated indexing of 10,000 pages of newly declassified documents ahead of Nuclear Non-Proliferation Treaty's (NPT) 50th anniversary. Assisted with Europe and Russia portfolio of ISN.

United States Senate, Washington, DC May 2018-June 2018
Congressional Intern
Addressed constituent concerns, drafted summary memoranda on briefings, and conducted Capitol tours.

SKILLS AND INTERESTS

Language Proficiency: Russian (near fluency in speaking and reading, intermediate in writing)
Interests: Basketball, hiking, baking, Eastern European literature, philately
Hold full Secret clearance (granted Mar. 6, 2023)

Record of: Jonathan P Wiersema
Penn ID: 59696471
Date of Birth: 07-MAR
Date Issued: 10-JUN-2023

U N O F F I C I A L Page: 1

The University of Pennsylvania

Level:Law

Primary Program
Program: Juris Doctor
Division : Law
Major : Law

INSTITUTION CREDIT:

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Fall 2021					
Law					
LAW	500	Civil Procedure (Fisch) - Sec 2	4.00	A-	
LAW	502	Contracts (Wagner) - Sec 2A	4.00	A	
LAW	504	Torts (Feldman) - Sec 2A	4.00	A	
LAW	510	Legal Practice Skills (Duncan)	4.00	H	
LAW	512	Legal Practice Skills Cohort (Brutus)	0.00	CR	
Ehrs: 16.00					
Spring 2022					
Law					
LAW	501	Constitutional Law (Berman) - Sec 2	4.00	A-	
LAW	503	Criminal Law (Mayson) - Sec 2	4.00	B+	
LAW	510	Legal Practice Skills (Duncan)	2.00	H	
LAW	512	Legal Practice Skills Cohort (Brutus)	0.00	CR	
LAW	628	Plagues, Pandemics, and Public Health Law (Feldman)	3.00	A-	
LAW	660	International Law (Burke-White)	3.00	A+	
Ehrs: 16.00					
Fall 2022					
Law					

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	SH	GRD	R
Institution Information continued:					
LAW	6010	Administrative Law (Wiener)	3.00	A	
LAW	6220	Corporations (Fisch)	4.00	A	
LAW	6300	International Investment Law and Arbitration (Burke-White/Born)	3.00	A+	
LAW	8020	Law Review - Associate Editor	1.00	CR	I
LAW	9580	Cybercrime (Levy)	3.00	A	
Ehrs: 14.00					
Spring 2023					
Law					
LAW	5650	Army War College (Knoll/McKenney/Shields)	2.00	CR	
LAW	8020	Law Review - Associate Editor	0.00	CR	I
LAW	8660	Ad-Hoc Externship (Barrett)	4.00	CR	I
LAW	8660	Ad-Hoc Externship Tutorial (Barrett)	0.00	CR	I
LAW	9000	International Women's Human Rights (de Silva de Alwis)	3.00	A+	
LAW	9990	Research Assistant (Wiener)	2.00	A	
Ehrs: 11.00					
LAW	8550	Jessup Moot Court Competition	2.00	IN PROGRESS	
In Progress Credits 2.00					

********** TRANSCRIPT TOTALS **********

	Earned Hrs
TOTAL INSTITUTION	57.00
TOTAL TRANSFER	0.00
OVERALL	57.00

********** END OF TRANSCRIPT **********

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Clerkship Applicant Jonathan Wiersema

Dear Judge Kelly:

I write to offer my strong recommendation for Jonathan Wiersema for a clerkship in your chambers. Over the past two years I have come to know Jonathan well as he has taken several of my classes and been involved in a number of co-curricular activities for which I serve as faculty advisor. I have been extremely impressed with Jonathan's academic abilities and intellect as well as with his interest in and dedication to the field of international law. I would rank him in the top 2-3% of students I have taught in more than 17 years at the University of Pennsylvania Law School. I urge you to offer him the opportunity to clerk for you.

I first came to know Jonathan when he was a student in my introductory class in international law during his 1L spring semester. The course is a large (101 students when Jonathan took the class) introduction to international law which I teach using a strict Socratic method, calling on more than 20 students each day. Jonathan was an active and helpful participant in our class discussions. He was always well prepared when his turn came in our Socratic discussions and was able to both answer questions and help guide our discussions forward. Jonathan showed a particular interest in international litigation and dispute settlement, raising questions and discussion points in our classes on international trade and investment law. I was impressed with his understanding of these issues and his curiosity about how states can resolve disputes through institutionalized processes. I was also impressed with Jonathan's outreach to me throughout the semester. He routinely attended zoom office hours, always with thoughtful, challenging questions or issues that had not been fully resolved in our classroom conversations. He clearly has a sharp mind and an analytically astute approach.

Jonathan wrote one of the three best exams in the class, earning one of only 3 A+s I awarded that semester. My exams present an incredibly complicated fact pattern and ask students to provide legal advice to the leader of a country on how to deal with those facts. This year's problem was ripped from the headlines of the war in Ukraine with a climate-change twist added in. Jonathan was able to deconstruct the fact pattern exceptionally well. So too, he was able to identify the most important and salient legal issues presented in the exam and apply the right rules to those facts. I was particularly impressed by Jonathan's organization of the exam that really put the pieces together in the most efficient way possible. His response was carefully thought out and
presented in a way that could make sense in context. He found every small trick buried in the exam and addressed it well. So too, he realized where the red herrings were and avoided them. He devoted his time smartly to the most important issues, digging into them and easily dismissing the issues that only required a simple application of law to fact.

Jonathan's exam was also very well written, clearly argued, and easily understandable. Given the pressure of time limits and word counts, I was impressed by Jonathan's ability to clearly and concisely convey complicated ideas in his exam. Overall, the exam was one of the best in the class and frankly one of the best I have seen in many years.

In the fall of Jonathan's 2L year, he took an advanced class I offer in international investment law. Once again, Jonathan was an active and enthusiastic participant in our classroom discussions, brining thoughtful insights and pertinent questions to the table. Jonathan was always eager to engage, regularly approaching me after class to continue the discussion. He shows a deep commitment to the issues and a real curiosity both about legal rules and their application to particular cases.

The investment law class requires students to write a significant research paper and, once again, Jonathan excelled. His paper offered an excellent treatment of the problems created for investment arbitration by the illegal occupation of territory. Drawing heavily on Russia's invasion of Ukraine and the consequences thereof, the the paper clearly spotlighted the challenges caused by such occupation and the seemingly unfair results that might be created by the application of traditional rules of international law. The paper developed potential new treaty language to help resolve such disputes in the future and advocated for innovative interoperative strategies to avoid giving unjust benefits to territorial occupiers. The paper was far and away the best in the class of more than 50 students and earned an A+ grade.

Reviewing Jonathan's paper in the preparation of this letter reaffirms my view that Jonathan is simply a fantastic student and extremely well prepared for a clerkship. The research behind the paper is sound, deep, and on point. He engages both with long-standing cases and timely arbitral awards related to Russia's invasion 2014 invasion of Crimea. The paper is thoughtfully organized, identifying a problem, showing how current approaches may result in an unacceptable outcome, and providing both interpretative and legal-reform-based solutions thereto. Finally, the paper is extremely well written, thoughtfully argued, and carefully edited. It is, simply, an excellent work product that I hope Jonathan will expand and publish in the years ahead.

Outside of the classroom, I have had the chance to interact with Jonathan both through his regular participation in office hours and through his role on the Jessup International Law Moot Court Team, for which I serve as faculty advisor. Jonathan was a regular participant in office hours, showing a willingness to reach out and a comfort level with meeting with the professor. His

William Burke-White - wburkewh@law.upenn.edu - 215-898-7674

office hours participation was always welcome, given that he thought hard about issues before office hours, asked great questions, and really appreciated the opportunity to think with me on challenging issues.

Jonathan served as one of the oralists on Penn's Jessup Moot Court team this past year and I had the opportunity to observe him in oral arguments on several occasions, both in prep sessions and for the competition itself. Jonathan was an excellent oralist, showing absolute command of the
material and the ability to respond effectively to judges questions. I was impressed by his ability to distill complicated fact patterns and really engage on the most pertinent issues in the case. Thanks in large part to Jonathan's excellent work, the team won the regional competition and advanced to the international rounds. Once again, Jonathan impressed me with his depth of understanding of international law and his analytic abilities.

I have had the chance to review Jonathan's overall Penn transcript and it is clear I am not the only professor impressed with his work. He received almost all grades in the A range, including from professors who are notoriously difficult graders. His first two years at Penn were exemplary and I have very high expectations for this future.

I have also spoken with Jonathan about his 1L summer, during which he conducted research through an internship in Tbilisi, Georgia. He greatly enjoyed the opportunity to work abroad on issues of legal access. So too, he was able to apply much that he learned in our international law class in the real world setting of Georgia-Russia relations.

Jonathan has explained his desire to undertake a clerkship as he prepares for a career in international and transnational litigation. I am firmly convinced that a clerkship is an ideal next step for him and that his future career will be a great success. In closing, I think very highly of Jonathan. I truly look forward to working more closely with him throughout the rest of his time at Penn Law. I rank him among the top students I have taught and urge you to offer him a clerkship.

Best regards,

William Burke-White, J.D., Ph.D.
Professor of Law
University of Pennsylvania Carey Law School
Tel 617.901.0391
wburkewh@law.upenn.edu

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Clerkship Applicant Jonathan Wiersema

Dear Judge Kelly:

Please accept this letter in enthusiastic support of Jonathan Wiersema's application for a clerkship.

I had the pleasure of teaching Mr. Wiersema in Administrative Law during the fall semester of 2022. He received an "A" as a result of his superlative performance on a long, challenging final exam. So good were his answers that I distributed each one to the class as a sample of an "A" answer. His answers reflected superior analytical abilities and an impressive understanding of a difficult subject matter. They were also exceptionally well organized and concise.

Mr. Wiersema's class participation was outstanding—perhaps the best of any student. His questions and comments reflected exemplary preparation and a sophisticated engagement with the course materials. He picked up on nuances in the course materials as few students did.

In the spring semester of this year, Mr. Wiersema served as my research assistant. I asked him to identify, catalogue, and prepare a database of all post-New Deal federal judicial decisions addressing the authority of agencies to adjudicate cases consistent with Article III and the Seventh Amendment. His work reflected not only excellent research abilities but also a sophisticated understanding of as difficult an area of legal doctrine as any. He is now preparing a written overview of his research. I am sufficiently confident that his overview will be of publishable quality that I have already arranged for it to be posted on Notice & Comment, a widely read blog of the Yale Journal on Regulation and the ABA's Section of Administrative Law and Regulatory Practice.

My interactions with Mr. Wiersema have always been a pleasure. He comports himself in the most professional manner, and he is unfailingly courteous and kind. He is also, among his other admirable traits, inquisitive and eager to learn. I trust that you would find him to be as welcome a presence in your chambers as I found him to be in my class.

If you have any questions, I would be pleased to hear from you (by phone at 215-370-8055 or by email at matthewlwiener@gmail.com).

Sincerely yours,

Matthew Lee Wiener
Lecturer in Law*

* Formerly Acting Chair, Vice Chair, and
Executive Director
Administrative Conference of the United States

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

June 11, 2023

The Honorable Timothy Kelly
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: Clerkship Applicant Jonathan Wiersema

Dear Judge Kelly:

It gives me great pleasure to recommend Jonathan Wiersema, Penn Law JD Class of 2024, for a clerkship in your chambers. Jonathan was a student both in my 1L Civil Procedure class in 2021 and in my Corporations class last fall. He received an A- in Civil Procedure and an A in Corporations. In addition to writing excellent exams, Jonathan was a regular and insightful contributor to class discussions. Jonathan's performance in my classes was consistent with his overall stellar academic performance in law school. As you know, Penn Law adheres to a mandatory curve in first year courses, so his grades truly reflect outstanding work. Penn Law does not release class rank information for its students, but in my experience grades like these would place Jonathan within the top 5% of his class. Jonathan's position as an editor of the Law Review, his work as a research assistant, and his participation in the Jessup International Moot Court Competition have further enhanced his research skills, suggesting that he would be particularly well-suited for a clerkship.

Beyond class, I got to know Jonathan through his regular participation in office hours. Jonathan stood out for his active engagement and his attention to detail, skills that, in my opinion, further enhance his attractiveness as a clerkship candidate. Jonathan is professional, highly motivated and personable. I believe that he would make a strong clerk and be a pleasure to work with in chambers.

I would be delighted to follow up by phone to convey my enthusiasm and support.

Sincerely,

Jill E. Fisch
Saul A. Fox Distinguished Professor of Business Law
Co-Director, Institute for Law and Economics
Tel.: (215) 746-3454
E-mail: jfisch@law.upenn.edu

Jonathan Wiersema (317) 384-3237 wiersema@pennlaw.upenn.edu

Writing Sample

I wrote this paper for my Cybercrime class during my 2L fall semester. I conducted all research and writing. The paper has not been edited by others.

Resolving the Electronic Border Search Circuit Split

By Jonathan Wiersema

Introduction

Airports are no fun. Endless lines, unexpected delays, and cramped spaces make traveling inconvenient. Cross the border and add to this process the experience of strangers rummaging through your belongings at customs. Yet, on February 26, 2018, Rejhane Lazoja learned that the government can search through much more than your luggage when entering the country.[1]

Returning from a trip to Switzerland, Lazoja waited in line as she made her way through customs at Newark Liberty International Airport.[2] Customs and Border Protection (CBP) officers pulled Lazoja aside for questioning and asked her if "she was ever a refugee."[3] Lazoja, who wears a head covering in accordance with her religious beliefs, inquired "whether the questions were a result of her . . . hijab."[4] Instead of providing an answer, CBP officers confiscated her password-protected phone and requested she unlock it.[5] Lazoja refused.[6] She would not see her phone for almost four months.[7] CBP officials had sent it to a Department of Homeland Security (DHS) lab, where agents are able to bypass password protection, copy the entire contents of a digital device, and conduct a forensic search of data, including deleted information — all without a warrant.[8]

Lazoja's experience highlights the central dilemma of the border search exception in the digital age. Under the exception, the government has wide authority to search individuals at the

[1] Plaintiff's Brief, Lazoja v. Nielsen, 2:18-cv-13113, ¶17 (D.N.J. 2018).
[2] *Id.*
[3] *Id.* at ¶24.
[4] *Id.* at ¶25, 28.
[5] *Id.*
[6] *Id.* at ¶32.
[7] *Id.* at ¶45.
[8] *Id.* at ¶43.

border without adhering to the Fourth Amendment's usual warrant requirement. At the same time, digital data is uniquely personal, leading the Supreme Court to limit a separate warrant exception for cell phones searched incident to arrest in *Riley v. California*.[9] This raises the question of how to apply the border search exception to digital devices? The law currently does not provide a clear answer, with circuit courts split on the issue. Some have recognized the unique nature of digital data and required the government to demonstrate varying degrees of suspicion. Others draw no distinction. Still more are only beginning to face the issue.

This paper attempts to provide a unifying standard that balances the border search exception's purpose with the unique nature of digital data. Part I of this paper outlines the border search exception and the reasoning in *Riley* that some circuits argue alters the law with respect to electronic searches. Part II details the existing circuit splits and why the legal inconsistency should be resolved. Part III offers a workable solution to the split: electronic border searches should be subject to a bifurcated standard — no suspicion for a manual search and reasonable suspicion for a forensic search.

Part I: State of Play

A. The Border Search Exception

The Fourth Amendment protects against "unreasonable searches and seizures" by government officials.[10] To conduct a permissible search or seizure, the government must first obtain a warrant by demonstrating probable cause.[11] However, Fourth Amendment standards are different at the border. The government possesses a "long-standing right . . . to protect itself by stopping and examining persons and property crossing into th[e] country."[12] Accordingly, border

[9] Riley v. California, 573 U.S. 373 (2014).
[10] U.S. CONST. amend. IV.
[11] *Id.*
[12] United States v. Ramsey, 431 U.S. 606, 616 (1977).

searches do not require a warrant or probable cause.[13] Rather, "border searches [are] considered to be 'reasonable' by the single fact that the person or item in question had entered . . . from outside."[14] This exception applies to searches at the physical border as well as its functional equivalents,[15] such as international airports,[16] ports,[17] and roadside checkpoints near the border.[18]

This, however, does not mean that "anything goes."[19] At the border the key distinction is between routine and non-routine searches. Routine searches, by virtue of occurring at the border, are reasonable and do not require any showing of suspicion. These types of searches include procedures many come to expect when traveling like luggage inspection, pat downs,[20] and drug-detection dogs,[21] as well as more elaborate searches such as removing a vehicle's gas tank.[22]

Meanwhile non-routine searches require a showing of "reasonable suspicion."[23] While the Supreme Court dodged the question of what exactly constitutes a non-routine search,[24] the Court's decision in *United States v. Montoya de Hernandez* serves as the singular point of reference. There, customs officials at Los Angeles International Airport detained the defendant for an extended period of time and required her to undergo a rectal examination based on the suspicion that she was carrying drugs in her "alimentary canal."[25] Since this search went

[13] *Id.* at 619.
[14] Ramsey, 431 U.S. at 619.
[15] United States v. Ortiz, 422 U.S. 891, 896 (1975).
[16] United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (Border search at Los Angeles International Airport).
[17] United States v. Solmes, 527 F.2d 1370, 1371 (9th Cir. 1975) (Border search at Mission Bay, San Diego).
[18] United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (Border search at roadside checkpoint).
[19] United States v. Seljan, 547 F.3d 993, 1000 (9th Cir. 2008).
[20] United States v. Beras, 183 F.3d 22, 26 (1st Cir. 1999).
[21] United States v. Kelly, 302 F.3d 291, 294 (5th Cir. 2002).
[22] United States v. Flores-Montano, 541 U.S. 149 (2004).
[23] Montoya de Hernandez, 473 U.S. 531 (1985).
[24] *Id.* at 541
[25] *Id.*